INNOVATION VERSUS REGULATION IN THE VIDEO MARKETPLACE

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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C O N T E N T S

INNOVATION VERSUS REGULATION IN THE VIDEO MARKETPLACE

WEDNESDAY, SEPTEMBER 11, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 2:04 p.m., in room 2123 of the Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Latta, Shimkus, Terry, Blackburn, Scalise, Lance, Guthrie, Gardner, Kinzinger, Long, Ellmers, Barton, Eshoo, Doyle, Welch, Lujan, Dingell, Pallone, and Matheson.

Staff present: Gary Andres, Staff Director; Ray Baum, Senior Policy Advisor/Director of Coalitions; Sean Bonyun, Communications Director; Matt Bravo, Professional Staff Member; Andy Duberstein, Deputy Press Secretary; Kelsey Guyselman, Counsel, Communications and Technology; Grace Koh, Counsel, Communications and Technology; Andrew Powaleny, Deputy Press Secretary; David Redl, Counsel, Communications and Technology; Charlotte Savercool, Legislative Coordinator; Tom Wilbur, Digital Media Advisor; Roger Sherman, Democratic Chief Counsel; Shawn Chang, Democratic Senior Counsel; Margaret McCarthy, Democratic Professional Staff Member; Kara van Stralen, Democratic Policy Analyst; and Patrick Donovan, Democratic FCC Detail.

Mr. WALDEN. We will call the subcommittee to order in just a moment if we could take our seats and close the doors. They are expecting votes on the House Floor in about 10 or 15 minutes, so we are going to call the subcommittee to order and at least begin our opening statements so that hopefully we can get through as much of that as possible so that as soon as we get back from the votes, which will probably take, I don't know, 45 minutes, an hour, then we can get to you all, who we invited here and appreciate your attendance. It is always most helpful.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

So I want to thank our witnesses for joining us and sharing their experience on innovative in the video marketplace.

You know, the Telecommunications Act in 1996 is old enough to get a driver's license, the Cable Act is old enough to drink alcohol legally, and the Communications Act of 1934 has been eligible for Social Security for a long time. While age is an asset to a fine Wil-

lamette Valley pinot noir, in a technology statute, age can portend irrelevancy. In the on-demand world of the internet and mobility, the statutes that govern the video marketplace are blissfully ignorant of the changes that have taken place around them.

Today, we will examine the legal regimes governing how video content is regulated from creation through distribution and finally to consumption, asking one simple question: in a world where video technology is rapidly changing, are the laws keeping pace and are they fostering a free market?

The video marketplace has changed significantly in the last 40 years. From the network news era of the 1970s to the dominance of cable in the '80s and the rise of the direct broadcast satellite industry in the '90s, each decade has seen a new video distribution competitor and a new attempt by Congress to manage the market.

Today, as a result of competition, at least 35 percent of American households have a choice of subscribing to either of the two satellite DBS providers, their local cable company, or the local telephone company for video services. Broadband is nearly ubiquitous, allowing consumers to access Netflix, Amazon, and Hulu. Tablet and smartphone apps produced by content creators allow baseball enthusiasts to watch live games or movie fanatics to stream the newest releases. And there is more innovation coming. New entrants like Intel and Google and Sony expect not only to enter the video distribution marketplace but to transform the way people watch television.

In this diverse and evolving marketplace, one thing remains true: you should be compensated for your content, network investments, or intellectual property. If you lay fiber, you should receive fair compensation in the marketplace for your investment. If you create content—movies, TV shows, or apps—you should receive fair compensation in the marketplace. And if you create smartphones, tablets, dongles, screens, or the software that runs on them, you should receive fair compensation in the marketplace.

Given these technological changes and the multitude of options available to American consumers, our laws should reflect the operation of the free market in a competitive environment. Instead, we have a satellite law that finds its origins in ensuring access to content for a fledgling industry, a cable law that was passed when cable controlled over 90 percent of the video market, and broadcast rules that ignore the rise of alternatives to over-the-air reception.

We can and should be engaged in a lively discussion—and I think we will be based on the testimony you all have—of how to unshackle the free market, how to remove the government from the business of manipulating the marketplace.

These are complex issues, and they are of great importance to consumers and to the industries, and everything should be on the table for discussion. We will hear from representatives of the content community, the major distribution networks, and from a representative from the public interest perspective to get a clearer picture of how our laws impact the video distribution business, affect consumers and how they could be changed to better reflect marketplace realities.

I want to thank our witnesses for being here. We are looking forward to hearing ideas on how we can improve the video market-

place by getting government more out of the way. This early stage of the process is a good time for us to take a larger look at the video marketplace; it takes time and process to develop good policy and even more to build consensus. Yet the deadline for reauthorizing STELA looms large, and we must continue to make progress there.

With that in mind, I expect to circulate a discussion draft on these issues no later than the first quarter of next year. I am looking forward to continuing to engage with my colleagues and the many industries represented here today on these important issues.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

I thank our witnesses for joining us and sharing their expertise on the innovative video marketplace. The Telecommunications Act of 1996 is old enough to get its driver's license, the Cable Act is old enough to drink alcohol legally, and the Communications Act of 1934 has long been eligible for Social Security. While age is an asset to a fine Willamette Valley Pinot Noir, in a technology statute age can portend irrelevancy. In the ondemand world of the Internet and mobility, the statutes that govern the video marketplace are blissfully ignorant of the changes that have taken place around them. Today, we'll examine the legal regimes governing how video content is regulated from creation through distribution and finally to consumption asking one simple question: in a world where video technology is rapidly changing, are the laws keeping pace and fostering a free market?

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Today, as a result of competition at least 35 percent of American households have a choice of subscribing to either of the two satellite DBS providers, their local cable company, or the local telephone company for video services. Broadband is nearly ubiquitous, allowing consumers to access Netflix, Amazon, and Hulu. Tablet and smartphone apps produced by content creators allow baseball enthusiasts to watch live games or movie fanatics to stream the newest releases. And there is more innovation coming. New entrants like Intel, Google, and Sony expect not only to enter the video distribution market but to transform the way people watch TV.

In this diverse and evolving marketplace, one thing remains true: you should be compensated for your content, network investments or intellectual property. If you lay fiber, you should receive fair compensation in the marketplace for your investment. If you create content—movies, TV shows, or apps—you should receive fair compensation in the marketplace. If you create smartphones, tablets, dongles, screens, or the software that runs on them, you should receive fair compensation in the marketplace.

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These are complex issues of great importance to consumers and industry and everything should be on the table for discussion. We'll hear from representatives of the content community, the major distribution networks, and from a representative from the public interest perspective to get a clearer picture of how our laws impact the video distribution business, affect consumers and how they could be changed to better reflect marketplace realities. I want to thank our witnesses for being here; we are looking forward to hearing ideas on how we can improve the video marketplace by getting the government out of the way.

This early stage of the process is a good time for us to take a larger look at the video marketplace; it takes time and process to develop good policy and even more to build consensus. Yet, the deadline for reauthorizing STELA looms large, and we must continue to make progress. With that in mind, I expect to circulate a discussion draft on these issues no later than the first quarter of next year. I am looking

forward to continuing to engage with my colleagues and the many industries represented here today on these important issues.

Mr. WALDEN. And with that, I would yield to the vice chair of the committee, Mr. Latta.

OPENING STATEMENT OF HON. ROBERT E. LATTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. LATTA. Well, thank you, Mr. Chairman. And I also want to thank our distinguished panel of witnesses for being with us to testify today. And today offers us the opportunity to continue a thoughtful and productive policy process by examining an important issue that affects all of our constituents.

The video marketplace continues to evolve faster than most consumers, let alone government, can keep up with. However, many of the existing provisions in the Communications Act either no longer apply to the existing marketplace or are in need of serious updating. I look forward to a thorough discussion among our subcommittee members and the stakeholders as we grapple with the issues in the ever-evolving video marketplace, as well as the most appropriate legislative vehicles to move any proposed changes.

I look forward to hearing from you all today, and with that, Mr. Chairman, I yield back.

Mr. WALDEN. I thank the gentleman. I now turn to my friend and colleague from California, Ms. Eshoo, for an opening statement.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman. And good afternoon to you, all the members of our subcommittee, and most especially welcome to all of our witnesses. Thank you for being here today to help enlighten us along this path.

You know, despite the title of today's hearing, innovation and regulation, I don't believe, have to be in conflict. I don't think it is an either/or. I think we have to have a very adult discussion about where we are today, where we need to go, understanding that what was written in the past served us well for a long time. But obviously, we need an update.

A vibrant video marketplace is one with competition, consumer choice, and basic protections to ensure the consumers have access to a competitive set-top box marketplace and aren't caught in the middle of a retransmission consent dispute they have no control over.

Time Warner Cable and CBS reached a resolution—we all know this, thank God—earlier this month that returned programming to more than 3 million consumers after 32 days of blackout. I applaud both companies for reaching an agreement, but unfortunately, this is not the first time such a dispute has occurred and it certainly, I don't think, will be the last. Since 2005, there have been 70—that is 7–0—disputes involving 392 stations in 297 markets for a total of 3,853 days of retransmission blackouts. Now, if someone out there wants to start defending this, I think it would be really interesting because I just don't think that it is defensible.

Some will say that legislating in this area is akin to picking sides or interferes with a retransmission consent mechanism that is working just fine. I don't think it is working just fine; I think it is broken myself. The reality is is that the data paints a very different picture. The discussion draft I released earlier this week is not a full rewrite of the law but instead represents a series of ideas intended to spur constructive and actionable debate on ways to improve the video marketplace for video content creators, pay-TV providers, and most importantly, consumers. They are picking up the tab. They are the customers. It is in everybody's interest I think.

Specifically, my discussion draft would give the FCC explicit statutory authority to prevent broadcast television blackouts; ensure greater choice in cable programming by allowing consumers to decide whether or not to subscribe to the broadcast stations electing retransmission consent; prohibit a television broadcast station engaging in a retransmission consent negotiation from making their own or affiliated cable programming a condition for receiving broadcast programming; instruct the FCC to determine whether the blocking of a television broadcast station owned or affiliated online content during a retransmission consent negotiation constitutes a failure to negotiate in good faith; and five, require the FCC to study the programming costs for regional and national sports networks in the top 20 regional sports market.

Now, this discussion draft doesn't purport to have all the answers, but as we embark on our third STELA-related hearing this year, I think we need to have a substantive dialogue about potential solutions to a constantly evolving video marketplace.

I want to thank the witnesses in advance for the testimony that you are going to give and for the feedback I hope that you will give this discussion draft that I just raised.

And I would also like unanimous consent, Mr. Chairman, to place into the record a letter to you and to myself from TiVo related to this hearing and their views on some of the issues that they feel strongly about. And I don't see——

Mr. WALDEN. Without objection.

[The information follows:]

September 10, 2013

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
2182 Rayburn Building
Washington, DC 20515

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications and Technology
241 Cannon Building
Washington, DC 20515

Dear Chairman Walden and Ranking Member Eshoo:

I understand the Subcommittee on Communications and Technology has scheduled a hearing for September 11, 2013 to hear from witnesses on innovation versus regulation in the video marketplace. Although TiVo has not been invited to testify at the hearing, we are a leading innovator in the video device space and are very concerned that the hearing presents Members with a false choice: ***either*** regulation ***or*** innovation. I think it is important for us to share our views with you on the critical role that the FCC has played to facilitate a competitive set-top box industry as directed by you and your Congressional colleagues in the 1996 Telecommunications Act, since these efforts are currently under attack.

In 1996 Congresswoman Eshoo, along with Congressmen Ed Markey (D-MA) and Tom Bliley (R-VA), proposed language that would do for video devices what the FCC's *Carterfone* decision did for telephones: give consumers, who do not have much choice among network providers, more choice in selecting the devices they use to connect to the network.

To implement this section, Section 629 of the 1996 Act, the FCC urged cable operators to reach agreement with the consumer electronics industry. Cable operators came forward with a standard CableCARD interface for national access by competitive entrant devices but did not promise to rely on this technology in their own devices. The FCC accepted this offer *provided* that cable operators (1) make CableCARDs available by July 1, 2000, and (2) rely on the CableCARD interface in their own newly fielded devices by January 1, 2005. The FCC determined that only by requiring "common reliance" by retail devices and operator-leased devices on the same security technology would retail devices receive the support necessary to attain the goals of Section 629. The first CableCARD-reliant products – televisions with CableCARD slots – came to market in 2003 – 2004 but in the absence of common reliance received poor or nonexistent support from cable operators (documented in FCC and court decisions). That lack of support finally led the FCC to implement common reliance (also known as the "integration ban") as of July 1, 2007. By this time, while CableCARD televisions were disappearing from the market due to lack of cable operator support, the emergence of High Definition

Television and the impending digital transition encouraged TiVo and others to begin selling HD CableCARD DVRs.

However, retail CableCARD devices were still being disadvantaged by cable operators. This prompted the FCC in 2010 to strengthen its CableCARD regulations to deal directly with cable operators' evasion of CableCARD requirements, by providing for consumer self-installation of CableCARDs, access to switched digital programming, and ending economic discrimination against competitive products. While CableCARD success has been hobbled by the cable industry's lack of support and refusal to allow retail devices to have access to two-way services like Video On Demand, CableCARD is a fully realized solution being used by over 600,000 consumers and growing.

In the name of eliminating unnecessary and burdensome regulation, the cable industry is proposing now to eliminate the FCC's integration ban. They are circulating legislation that would end common reliance and allow operators to lock out competitive devices, by – as they did before the "integration ban" became effective – offering superior access to programming and functions to their own devices, and inferior and faulty access to competitive devices. This can include not only renewed discrimination against existing CableCARD-reliant devices, but also unequal implementation of new, IP-based technologies. The proposed legislation would remove from the FCC a critical tool to redress such discrimination against competition and implement a successor solution to CableCARD.

Until common reliance became the rule and cable operators began relying on CableCARDs themselves, the technology defied Moore's Law – it remained generationally frozen and needlessly expensive, while similar technologies became cheaper, faster, and more reliable. Only common reliance has brought the cost down and brought a moderate level of support for retail devices. An end to common reliance would freeze this progress on CableCARDs, allow cable operators to exclude CableCARDs from future product plans, and eliminate any incentive for the industry to help develop a successor solution for retail devices.

Despite the challenges, TiVo has been able to provide consumers with a choice of set-top boxes rather than having to rely on an operator-supplied box. As a company whose business depends on providing consumers with superior set-top boxes than their cable-provided options, TiVo has furthered the goals of Section 629 by being a leader in innovation in video devices. For example, TiVo was the first company to introduce the Digital Video Recorder as well as the first to make services like Amazon video rentals available on the television. TiVo also pioneered the ability to transfer cable television shows from a DVR to computers and mobile devices, and the integration of traditional television and over-the-top content into a seamless integrated user interface. TiVo's latest set-top box, called Roamio, has been heralded as "the Holy Grail of Set-Top Boxes" (Wall Street Journal), "the best TV viewing experience that money can buy" (VentureBeat), "the ultimate cable TV viewing experience" (Mashable) and "a big step up for cable TV subscribers" (TechHive).

Outside of video device industry, the explosion in innovation around communications devices is staggering. Today consumers can choose from a vast array of mobile and computing devices: smart phones, computers, lap tops, tablets, e-book readers, netbooks and other devices that easily connect to the wireless communications networks and the internet. This increased competition has led to lower prices, innovation and, lots of choice which has benefitted consumers.

Admittedly, set-top boxes represent an exception to this otherwise thriving marketplace of devices, because of the impediments discussed above. Still, the benefits of retail competition and greater consumer choice are clear. Congress should not undermine the limited choice consumers have today and remove tools the FCC has to increase consumer choice in the future until the consumer choice envisioned by Section 629 is fully realized.

Thank you for your continued support of consumers and innovative technology companies.

Sincerely,

Matthew Zinn
Senior Vice President, General Counsel and
Chief Privacy Officer
TiVo Inc.
2160 Gold Street
San Jose, CA 95002

Ms. ESHOO. I would like to place Mr. Dingell's statement in the record. I ask unanimous consent.

Mr. WALDEN. Without objection.

[The prepared statement of Mr. Dingell follows:]

Statement of
Representative John D. Dingell
Committee on Energy and Commerce
Subcommittee on Communications and Technology
Hearing on "Innovation Versus Regulation in the Video Marketplace"

September 11, 2013

Thank you, Mr. Chairman.

To the consternation of our witnesses, I'm sure, I have no "yes" or "no" questions to ask this afternoon. Instead, I'd like to use my time to make a few observations.

First, I note that this is the third "future of video" hearing the Subcommittee has held this Congress. I applaud the Chairman's oversight efforts in this matter but remind my colleagues that we have to do some legislating as well. The Satellite Television Extension and Localism Act (STELA) must be reauthorized by the end of next year, and I urge the Chairman to proceed with that important work without delay. Previous reauthorizations have required time and careful consideration, and we would do well to consider legislative text sooner rather than later. To that end, I commend the Chairman for his announcement that the Committee will soon consider a bill.

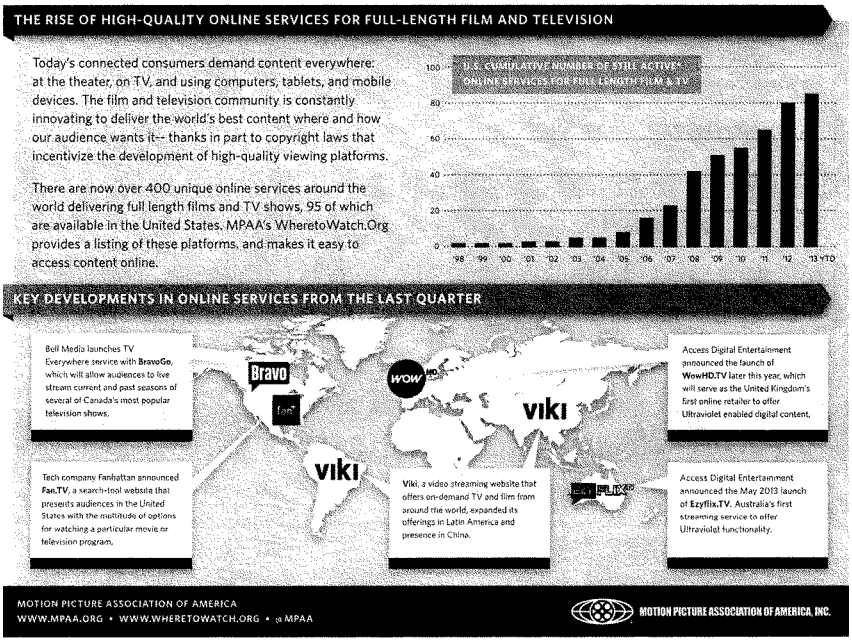
Second, if the Subcommittee chooses to move forward with legislation to overhaul regulation of the video marketplace, I suggest that it do so very cautiously. Regulation, perhaps regarded by some as government intervention, can sometimes play a constructive role in prompting private sector innovation and promoting consumer choice. The trick, however, is ensuring that such regulation doesn't incent bad behavior or allow regulated entities to game the system. I am concerned about reports I have read in the press which state some parties have used the hope of government intervention to accomplish this. If that be so, consumer choice, competition, and innovation may suffer. With all of this in mind, I remain ready, willing, and able to work with my colleagues to write a bill that fairly balances the needs of consumers, content producers, and video distributors.

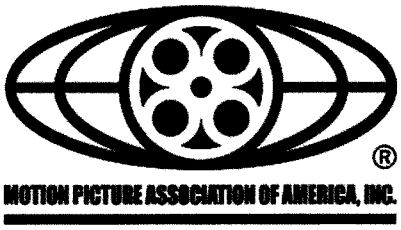
Thank you for your courtesy, Mr. Chairman. I yield back the balance of my time.

Ms. ESHOO. And I have 17 seconds left if any of my colleagues would like to use it. All right. With that, I will yield back the balance my time.

Mr. WALDEN. The gentlelady yields back. And I ask unanimous consent to enter into the record a graphic and statement from the Motion Picture Association of America detailing the economic impact of video content and the rise in online options for consumers. Without objection.

[The information follows:]


THE RISE OF HIGH-QUALITY ONLINE SERVICES FOR FULL-LENGTH FILM AND TELEVISION
Today's connected consumers demand content everywhere: at the theater, on TV, and using computers, tablets, and mobile devices. The film and television community is constantly innovating to deliver the world's best content where and how our audience wants it-- thanks in part to copyright laws that incentivize the development of high-quality viewing platforms.
There are now over 400 unique online services around the world delivering full length films and TV shows, 95 of which are available in the United States. MPAA's WheretoWatch.Org provides a listing of these platforms, and makes it easy to access content online.
U.S. CUMULATIVE NUMBER OF STILL ACTIVE* ONLINE SERVICES FOR FULL LENGTH FILM & TV
100
80
60
40
20
0
'98 '99 '00 '01 '02 '03 '04 '05 '06 '07 '08 '09 '10 '11 '12 '13 YTD
KEY DEVELOPMENTS IN ONLINE SERVICES FROM THE LAST QUARTER
Bell Media launches TV Everywhere service with BravoGo, which will allow audiences to live stream current and past seasons of several of Canada's most popular television shows.
Bravo
fan
WOW HD
viki
viki
Access Digital Entertainment announced the launch of WowHD.TV later this year, which will serve as the United Kingdom's first online retailer to offer Ultraviolet enabled digital content.
Tech company Fanhattan announced Fan.TV, a search-tool website that presents audiences in the United States with the multitude of options for watching a particular movie or television program.
Viki, a video streaming website that offers on-demand TV and film from around the world, expanded its offerings in Latin America and presence in China.
EzyFlix
Access Digital Entertainment announced the May 2013 launch of EzyFlix.TV, Australia's first streaming service to offer Ultraviolet functionality.
MOTION PICTURE ASSOCIATION OF AMERICA
WWW.MPAA.ORG • WWW.WHERETOWATCH.ORG • @MPAA
MOTION PICTURE ASSOCIATION OF AMERICA, INC.



National GDP Revised to Reflect The Economic Activity Generated By Film and Television

by Senator Chris Dodd 07/31/2013 09:03 (UTC-08:00) Pacific Time (US & Canada)

This morning, the Department of Commerce said that the United States' Gross Domestic Product (GDP) is bigger than we thought -about 3% bigger. And we have R&D and a wide range of creative works including movies, like Disney's *Iron Man*, and television shows, like HBO's *Game of Thrones*, to thank for it.

Starting today, the Bureau of Economic Analysis (BEA) is changing the method it uses to calculate GDP to better reflect the economic contributions that come from businesses investing in research and development and the creation of copyrighted works like films and television series. Put simply, this means that the national GDP now more accurately reflects the economic activity generated by creative works.

Originally announced back in March, this "comprehensive review" is among those carried out by the Bureau every five years or so in order to better quantify the GDP, and the latest change reflects the realities of an economy that is dependent on people investing in ideas and developing new intellectual property, along with tangible goods.

The BEA has revised the calculations for the GDP all the way back to 1929, showing that it has actually been about 3% higher than previously reported. According to these new numbers, research and development and entertainment added $471 billion to the revised $16.2 trillion overall economy through the end of 2012. The investment in films, television shows, literature and music produced by the entertainment industry was approximately $74 billion in 2012, and $75.3 billion in Q2 of 2013.

For years, the BEA treated the money that was spent creating new entertainment works as current expenses -- or costs of business. Therefore the film and television industry was captured

in the GDP only downstream based on revenue generated by film and television products, and did not include the impact on the economy based on their investment.

The change reflects that in economic terms, film and television works are an intangible asset, not an expense. Long after they're first developed, these creations continue to retain their value and deliver residual benefits. Films and TV shows, for instance, are licensed and sold to different markets for years - even decades - after their original release. It goes without saying that when productions decide to film a movie or television show in a local community, they invest a great deal of money there when they create production facilities, employ local workers as members of the cast and crew, and rely on local small businesses over the course of production - now the impact of that production investment is being reflected in the national economic calculations as well.

These artistic originals will be getting the recognition they deserve as long term investments that contribute to the strength of the U.S. economy. Today, we live in a world and in a country where researchers, technology developers, and creative artists are vital to the economy. While these changes in BEA's formula will not change the economic growth the nation has experienced, they will give us a much more accurate picture of the world we live in today. And they will more accurately reflect the important role that the American film and television industry has, and will continue to play, in strengthening our nation's economy.

This piece was originally posted on HuffingtonPost.Com and can be read in its original format here.

Categories: Innovation, Job Production

Tags: Bureau of Economic Analysis, Chamber of Commerce, GDP, MPAA

Mr. WALDEN. I now turn to Mrs. Blackburn, the vice chair of the full committee, for 5 minutes. And we have a couple other Members who would like time on that as well, if possible.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. That is correct. And I thank you, Mr. Chairman. I thank all of you for being here to visit with us today, and I kind of like the titling of this hearing, "Innovation Versus Regulation."

And I have to tell you what I hear from so many of your product consumers in Tennessee, my constituent, is they feel like that innovation sometimes is harder to get to because of cost and because of regulation, especially when you are looking at some of the archaic video regulations that are stifling them from getting the content that they would like to have access to at fair market prices.

Innovation isn't happening as rapidly as we would like because we don't always have a free marketplace if you will in all of those areas. That is because the video marketplace is saddled with a 20-year-old law that unfairly treats competing video distributors with different rules. At the last video hearing, one member called the video marketplace a "vast web of regulations." That is correct. Another colleagues said, "the video market is rapidly changing. Today, the government intervenes in various ways." That is also correct. Our ranking member correctly said "much has changed since the '92 Cable Act." Very true. And that "we have a lot of work to do beyond STELA," which is also very true. I think you are going to see quite a bit of an agreement on these issues and I think the chairman is very wise to start these hearings and to continue through this process. As we look at the authorization of STELA, we are not waiting until we get to the end of 5 years to begin the work.

So thank you and we appreciate that you are here with us. And at this time I yield to Mr. Barton 1 minute.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. I thank the gentlelady. I thought the chairman's opening statement was excellent. I think Ms. Eshoo and Mrs. Blackburn have enhanced it. I do think it is time to do a complete review of our various telecommunications laws and regulations. By definition, regulation stifles innovation and I think by definition we can all assume that the more innovation we have in the telecommunication marketplace, the better off the country will be. So I hope these hearings, Mr. Chairman, lead to concrete legislative action in this Congress. I especially want to take a look today on some questions about the way retransmission consent has been used most recently.

And with that, I yield to whomever I am supposed to yield to.

Mrs. BLACKBURN. You yield back to me.

Mr. BARTON. I yield back to you.

Mrs. BLACKBURN. And I yield at this time a minute to Mr. Scalise.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. I thank the gentlelady from Tennessee for yielding.

Mr. Chairman, I want to thank you for the process-driven approach to reviewing the decades-old video marketplace regulations, and I am particularly pleased to hear that you will soon circulate draft legislation that addresses these issues. I applaud you for successfully moving this subcommittee beyond an initial information-gathering and educational phase on these very technical and complex issues onto a strong position upon which the subcommittee can act in the coming months.

I also want to commend Ranking Member Eshoo for recently putting her own reform ideas on the table with the release of the Video Choice Act. While I am not in agreement with every provision of her bill and have taken a different approach, I view it as thoughtful and am encouraged by her strong interest in tackling these issues.

I think we should all keep in mind that when these current video laws were written, this was the modern-day version of the smartphone, so clearly the laws are tremendously outdated that deal with this important issue that we are addressing today, and it is time to have this modernization.

The only way we can act in the best interest of consumers is in a way that prevents the government from picking winners and losers and it is when we start getting serious about a free-market solution. I am pleased that is where these hearings and conversations are headed, and I will look forward to continuing the close dialogue with industry stakeholders and my colleagues on this subcommittee.

So again, Mr. Chairman, I thank you for the hearing and I am looking forward to hearing our panel. And I yield back to the gentlelady from Tennessee.

Mrs. BLACKBURN. I thank the gentleman for yielding back and I thank him for the appropriate prop that he brought to the committee. And, Mr. Chairman, I yield back the balance of our time.

Mr. WALDEN. I am just amazed that he uses that. Actually, with Scalise I am not amazed. Oh, just kidding.

We are going to go to Mr. Welch now for 5 minutes. He is going to control Mr. Waxman's time. And we have 7 minutes left before the vote, but 404 Members have not voted.

OPENING STATEMENT OF HON. PETER WELCH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VERMONT

Mr. WELCH. Well, thank you very much. A couple things: one, the comments are about the fact that the technology has so outpaced the regulation or the law. We all know that we have to make some significant changes and ask some basic questions.

Mr. Chairman, thank you for introducing or you are going to introduce the draft discussion. And, Madam Ranking Member, thank you for putting something on the table that is going to get the discussion going.

The concern I have is one that has been identified by everyone here, namely, we have got to get the law right; we have got to get

the regulations right. And right means there has got to be a lot of space for innovation. It means that there have to be rules of the road that are discernible and fair. But it also means we have to have a business model where the various players—the content providers, the broadcasters, distributors—can pay their bills and make a reasonable return.

But my concern, too, is that we have got to look out for the consumers. It is really getting out of hand. In the past 17 years the cost of cable and satellite TV has increased three times the rate of inflation. And, you know, this is a big deal for all of the people we represent, especially in rural areas. And, you know, the consumers need their access to the content in whatever manner they get it in their homes. And it is a big deal for them. And you know that. But they have no power whatsoever to affect what the situation is or what they are going to be charged.

So if there is some business model out there where executives can literally pay a couple hundred million dollars to somebody who can't get to first base because they can pass it on to the consumers that all of us represent, that is not working. So having the basic questions here that have been put on the table, I think that really makes a lot of sense.

The thing I hear from Vermonters, they are really getting squeezed on the cost of cable and satellite. You know, we are not going to have a proposal that is a panacea, but what we do have to do is have some approach where, as I mentioned, it is balanced because we have to have business models that work. We have to have rules and regulations that don't stifle innovation. But at the end of the day, we have got to do something to give some reasonable, fair treatment to consumers who have absolutely no ability to affect what some of these big deals and big negotiations are.

So I commend the leadership on our committee for putting these issues on the table and hope to have our committee be successful in doing things that restore balance with laws that are way out of date.

I have some time and I would be glad to yield it to either of my colleagues.

Mr. WALDEN. Mr. Lujan.

OPENING STATEMENT OF HON. BEN RAY LUJAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Mr. LUJAN. Mr. Chairman, thank you so much. And I also appreciate the fact that everyone has gotten together to encourage a broader conversation in this space.

And I think the one thing that I have been talking about in my office with some of my team members, and this was a result of watching Monday night football, the first channel that I put it on was on standard definition, and there were a lot of pixels and blocks moving around the television. And I quickly realized that there was a high-definition channel that we could change to, and so once I moved there, everything was clear. And when I thought my eyes were going, I realized that they weren't.

But the question that I have as we talk about retransmission fees associated with standard definition or low definition, weak def-

inition, whatever we want to call it, versus high-definition is the complexities associated with what is required to get that feed to the home to be able to use a technology, but also the rates associated with those packages. And quite honestly, if we are signing up for one package or another, well, why are we getting the two channels as opposed to the one?

And so I think that this is a question that I have just from a cost perspective, from a spectrum utilization perspective, from a space perspective with where we are transforming and where we are going from an innovative perspective. And I would just like to pursue a little bit more and learn a little bit more. So I appreciate the time very much and I yield back.

Mr. WELCH. I yield back. Thank you.

Mr. WALDEN. Everyone has yielded back. We are going to go into recess now. We will return after the votes as soon as possible, and then we really look forward to hearing your comments, your testimony and taking our questions.

So with that, the committee will stand in recess.

[Recess.]

Mr. WALDEN. I call this subcommittee hearing back to order. I thank you all for your patience as we had the vote on the floor.

And I think at this point we have been through opening statements on both sides, and it is time to go to our distinguished panel of witnesses.

And we will start with Sandra Aistars, the Executive Director of the Copyright Alliance. And I would just counsel you, pull that microphone pretty close, make sure the button is lit on green, and you should be good to go.

STATEMENTS OF SANDRA M. AISTARS, EXECUTIVE DIRECTOR, COPYRIGHT ALLIANCE; R. STANTON DODGE, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, DISH NETWORK, LLC; EDWARD L. MUNSON, JR., VICE PRESIDENT AND GENERAL MANAGER, KPHO–TV, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS; DAVE ROZZELLE, EXECUTIVE VICE PRESIDENT, SUDDENLINK COMMUNICATIONS; JAMES CAMPBELL, VICE PRESIDENT OF REGULATORY AND LEGISLATIVE AFFAIRS, MIDWEST REGION, CENTURYLINK, INC.; AND JOHN BERGMAYER, SENIOR STAFF ATTORNEY, PUBLIC KNOWLEDGE

STATEMENT OF SANDRA M. AISTARS

Ms. AISTARS. Great. Thank you. Chairman Walden, Ranking Member Eshoo, and members of the subcommittee, thank you for the opportunity to testify today about the exciting innovation that is occurring in the video marketplace.

Innovation and the creation and distribution of video programming is happening throughout our membership and all across the spectrum of creators. From major motion picture companies to indie filmmakers, audiences have never had as many options for watching movies, television shows, and original web-based programs as a result.

But creating audiovisual works with high production values is an expensive proposition. The work is labor- and talent-intensive and

it can carry commensurately large costs. Independent filmmakers, for instance, routinely spend thousands, hundreds of thousands, or even millions of dollars to create their works.

One of our members, the mother-daughter filmmaker duo of Gail Mooney and Erin Kelly spent 3 years making a film about individuals who are making a positive difference in the world. After 6 months of preproduction work, it took 99 days, travel to 6 continents and 17 countries, and then 30 flights, 14 vaccinations, 8 visas, 2,900 gigabytes of storage, 150 hours of footage, and 5,000 still image captures followed by a year of postproduction and another year of marketing and distribution to produce and distribute the film. And this was done as a do-it-yourself project.

The bottom line is that all creators make big investments in their works and encouraging them to keep creating will require ensuring that they have flexibility in how they distribute their works. Happily, because creators are embracing new modes of distribution, audiences have more choices than ever before for viewing films and television programs. Services such as Netflix, Hulu, VUDU, HBO GO, Crackle, MUBI, Amazon, EpixHD; devices such as Apple TV and Roku; and technologies such as UltraViolet enable consumers to watch what they want when they want and where they want.

Five years ago, video streaming was still fairly rough in terms of quality and reliability, but today, viewers are enjoying a growing number of high-definition streaming services, including scores of video-on-demand and TV-everywhere models delivered by cable and satellite, and more households than ever have access to this variety of programming through the internet. These developments show that the video marketplace is evolving daily and at an ever-increasing pace to the benefit of audiences.

A couple of words about copyrights since I am a copyright lawyer, copyright law recognizes that ensuring appropriate rights to authors drives innovation and benefits society. Ensuring the authors right to determine when and how to license the distribution of his or her works is key to these benefits. These principles have been confirmed over and over again by Supreme Court decisions, and as Justice Sandra Day O'Connor eloquently wrote, "the Framers intended copyright itself to be the engine of free expression by establishing a marketable right to the use of one's expression. Copyright supplies the economic incentive to create and to disseminate ideas."

Compulsory licenses are a departure from normal copyright principles. They are appropriate only in narrow circumstances to address market failure and we restrict their use to such cases because they abrogate the rights of property owners and force them to license their works to government-favored entities at rates sometimes set by the government.

Economists and policy experts alike criticize compulsory licensing on three basic grounds: first, because the supposed cost savings that compulsory licenses deliver in the short-term are usually more than offset by the inefficiencies that they can cause over time; second, because they limit the diversity of services that would ordinarily develop via marketplace licensing; and third, because the rates and restrictions quickly become outdated and are difficult to

change so they are subject to legislative lock-in and result in price stagnation.

Accordingly, my message to you is that, given the creative and compelling works and the new and innovative distribution models that exist today, there is no need to impose new compulsory licenses in the video marketplace or to renew STELA.

And as a closing note, I would just like to mention positively some of the collaborative initiatives that are currently happening across industry lines to ensure that marketplace for use services is vibrant and safe. There are numerous efforts that are ongoing with internet service providers, with advertisers, with payment processors to educate consumers about the diversity of programming options available to them and to protect them from illegal sites and activities online. These efforts are just the start. We need to do more. But I would like to commend the efforts like the copyright alert system as examples of how our mutual goal to provide compelling legal services to consumers is being advanced through cooperation, and I would urge the subcommittee to take an interest in these efforts and encourage the success of these initiatives.

Thank you.

[The prepared statement of Ms. Aistars follows:]

Testimony of Sandra M. Aistars, Executive Director, Copyright Alliance

Before the Committee on Energy and Commerce
Subcommittee on Communications and Technology

Innovation Versus Regulation in the Video Marketplace

September 11, 2013

Chairman Walden, Ranking Member Eshoo, Members of the Subcommittee, thank you for the opportunity to testify today about the exciting innovation occurring in the video marketplace.

The Copyright Alliance is a non-profit, public interest and educational organization of artists, creators, and innovators of all types. Our members include artist membership organizations and associations, unions, companies and guilds, representing millions of creative individuals. We also collaborate with and speak for thousands of independent artists and creators and small businesses who are part of our One Voi©e grassroots group.

Innovation in the video marketplace, and the costs of producing high quality works

Innovation in the creation and distribution of video programming is happening throughout our membership and all across the spectrum of creators – from major motion picture companies and television show creators, to young, indie filmmakers, documentarians and web-based artists and programmers working on their own.

As a result, audiences have never had as many options for watching movies, television shows and original web-based programs.

Creating audiovisual works with high production values is an expensive proposition whether you are an independent documentarian, a major motion picture studio, or a television production company. Writing, directing, producing, acting in, staging, filming, and editing such works is labor and talent intensive, and can carry commensurately large costs. Independent filmmakers routinely invest hundreds of thousands or millions of dollars whether they are creating documentaries, animated works or live action films.

Two of our grassroots members, mother/daughter filmmaking duo Gail Mooney and Erin Kelly, spent three years making a film documenting the stories of eleven individuals on six continents who are working to make a positive difference in the world. The documentary, *Opening Our Eyes,* seeks to create awareness about the power of the individual and inspire others to do what they can to improve the world. After six months of pre-production work, it took 99 days, travel to six continents and seventeen countries, and thirty flights, fourteen vaccinations, eight visas, 2900 gigabytes of storage, 150 hours of footage, and 5000 still image captures, followed by a year of post production, and another year of marketing and promotion to produce and distribute the film. Gail and Erin are currently using web 2.0 technology and social media to screen their film around the world and are pursuing video on demand distribution via Vimeo and VHX.

On the other end of the spectrum, Hollywood movie studios routinely invest hundreds of millions of dollars creating, distributing and marketing blockbuster films to entertain us. And creating original episodic programming is likewise expensive and talent Intensive. Netflix reportedly spent $100 million dollars to create its original series *House of Cards.*[1] HBO spends an average of $6 million an episode to make *Game of Thrones.*[2] Creators

[1] Steven Rosenbaum, *Netflix's Risky Strategy For 'House of Cards'*, Forbes (Feb. 5, 2013), http://www.forbes.com/sites/stevenrosenbaum/2013/02/05/netflix-risky-stratedy-for-house-of-cards/.

[2] Leslie Gornstein, *Holy Flaming Warships! How Expensive is* Game of Thrones, *Anyway?* E Online (May 28, 2012), http://www.eonline.com/news/318306/holy-flaming-warships-how-expensive-is-game-of-thrones-anyway/.

large and small take big financial risks in developing their works. Encouraging them to keep creating will require respecting their choices in how they distribute their works.

Innovation in modes of distribution

Happily, because creators are pursuing diverse modes of distribution, audiences have more choices than ever before for viewing films and television programs. Services such as Netflix, Hulu, VUDU, HBOGO, Crackle, MUBI, Amazon, and EpixHD; devices such as AppleTV and Roku; and technologies such as UltraViolet enable consumers to watch what they want, when they want, where they want. The creative community has embraced all of these options, and is continually creating more opportunities for audiences.

Five years ago, video streaming was still fairly rough in terms of quality and reliability, but today viewers are enjoying a growing number of high definition streaming services including:

- *NBC Sports Live Extra,* which allows free online live viewing of selected sports events in HD on multiple devices. The service includes several exclusive camera angles that viewers can switch between to enjoy sporting events in ways not possible even when viewing them live.
- *Vimeo On Demand,* which allows filmmakers to charge for access to videos. Demonstrating how the video marketplace is evolving on all levels, Vimeo recently began offering advances to filmmakers in exchange for temporary exclusive streaming rights to their works.
- *YouTube* -- in addition to its free videos, YouTube launched paid subscription channels in May, and currently offers over 50 channels with fees starting at $0.99/month.

- Cable and satellite companies and networks have collaborated to launch a variety of video on demand services, including *TV Everywhere* services for delivering online, on-demand television programs and movies to cable subscribers via a variety of devices.
- *Stageit* is a service that allows creators to broadcast live, interactive shows with monetization opportunities. Although the service is primarily geared toward musicians, as a video platform it has application to other types of works.
- And the rising popularity of Webisodes -- short episodes, outtakes character explorations or other additional content of television programs and films developed specifically for the internet – shows that not just the services but also the programming available to audiences is evolving and changing.

Today more households than ever have access to this variety of programming. Almost 42 million homes—more than 35 percent of TV-households—have a TV connected to the Internet directly or through a game console, online set-top box, or Blu-ray player, according to estimates cited in the FCC's 2013 video competition report. Using these technologies, more than 400 legitimate streaming services worldwide are offering movies and TV shows, including programming produced specifically for online distribution. This includes nearly 90 services in the United States. (To see a current list visit www.WhereToWatch.org.)

Creators, and non profit entities like the Copyright Alliance, are also developing their own new platforms through which independent filmmakers can screen their work, find resources, and reach distributors interested in their films. One such project is the NewFilmmakers series. The NewFilmmakers series was created in 1998 by NYU Film

Students in order to show their work and promote themselves in the New York film community.

To create opportunities for recent film school graduates, NewFilmmakers screens a wide range of films including animation, documentaries, shorts, and features in both live and on-line screenings. Many are films and videos overlooked by traditional film festivals. NewFilmmakers NY screens every week at Anthology Film Archives on the Lower East Side. Films screened at Anthology are also screened on line at www.newfilmmakersonline.com. In addition, Newfilmmakersonline.com provides opportunities for young filmmakers to screen their films privately or publicly online, sell downloads, and connect with indie distributors.

Building on the success of the NewFilmmakers series, the Copyright Alliance has partnered with NewFilmmakers to launch a further live and online screening venue and provide educational resources to an even younger generation of filmmakers via www.youngfilmmakers.com this fall. Applying the NewFilmmakers model, and expanding it to include further educational resources about creating, licensing, and protecting their work www.youngfilmmakers.com will empower the next generation of filmmakers age 14-24 to learn, collaborate, create and share their work with audiences.

These examples show that the technologies and business models underlying the video industry are evolving daily and at an ever-increasing pace. The creative community is innovating and experimenting with different ways of creating, funding, and delivering video to viewers. This experimentation is healthy and spurs the development of other delivery systems. We must allow artists to create, entrepreneurs to innovate, and markets

to operate in this burgeoning environment without imposing the constraints of new compulsory licenses on them

The economic contributions of the creative community

Allowing breathing space for creativity is good for the economy. The creative community is producing jobs and other important economic benefits locally and nationally. In 2011, the motion picture and television industry supported 1.9 million jobs; $104 billion in wages, with an average production salary of $84,000. These businesses also contributed $16.7 billion in sales, state income, and federal taxes; and exports of these works created a $12.2 billion trade surplus in the sector. Importantly, the motion picture and TV industry includes more than 108,000 businesses located in every state in the country. Many of these are small businesses -- 85 percent employ fewer than 10 people. Truly, innovation in the video marketplace knows no bounds.

The Founders recognized that a creator's right to control the distribution of his or her work would spur creativity and innovation

Article I, Section 8 of the Constitution grants Congress the authority "to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As one of the few constitutionally enumerated powers of the Federal government, this grant of authority reflects the Founders' belief that copyright protection is a significant governmental interest, and that ensuring appropriate rights to authors would drive innovation and benefit society. Ensuring the author's right to control the distribution of his or her works is key to these societal benefits.

In Federalist Paper 43, James Madison said of the Clause, "The utility of this power will scarcely be questioned. " And he asserted that "the public good fully coincides in both

cases with the claims of individuals." Early Supreme Court cases reinforce the belief that "[t]o promote the progress of the useful arts is the interest and policy of every enlightened government." [1]

Because, in Madison's words, "[t]he public good fully coincides with the claims of individuals," in ensuring authors' rights would be protected, the focus of copyright law has properly been first on the author, but the ultimate effect is a benefit to society at large. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."[2]

In *Twentieth Century Music Corp. v Aiken,* the Supreme Court reiterated this goal.[3] "The immediate effect of our copyright law is to secure a fair return for an "author's creative labor. But the ultimate aim is by this incentive to stimulate artistic creativity for the general public good."

It is axiomatic that to benefit society, copyright law must have a dual purpose: to create a framework that encourages both creation and dissemination/commercialization of works. As the Court explained in *Golan v. Holder,* "Nothing in the text of the Copyright Clause confines the "Progress of Science" exclusively to "incentives for creation." Evidence from the founding, moreover suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science. Until 1976, in fact, Congress

[1] *Grant v Raymond,* 31 US 218 (1832).

[2] *Mazer v Stein,* 347 US 201,219 (1954).
[3] 422 U.S. 151, 156 (1975).

made "federal copyright contingent on publication [,] [thereby] providing incentive not primarily for creation, but for dissemination. [Later Supreme Court] decisions correspondingly recognize that "copyright supplies the economic incentive to create *and disseminate* ideas." [4]

As Justice Sandra Day O'Connor eloquently wrote "In our haste to disseminate news, it should not be forgotten the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[5]

Since the dissemination of works properly requires the consent of the author, the history and development of copyright law reflects both economic and other societal goals. A creator's control over the use of his or her work – the right to determine how and when to license it – drives innovation and creativity. In fact, international law elevates this right to a human right.[6]

Compulsory licenses

There is no justification for expanding the existing compulsory license regime. To the contrary, Congress should consider sunsetting it consistent with the public interest. Compulsory licenses are an extraordinary departure from normal copyright principles which ensure that creators have the right to distribute their works how they see fit. They are appropriate only in narrow circumstances to address market failure. International

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[4] Golan v Holder, 565 US __ (2012)

[5] *Harper & Row v Nation Enterprises*, 471 US at 557-558 (1985)

[6] *See* UN Declaration of Human Rights, Article 27:
(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

treaties restrict their use to such cases because they abrogate the rights of property owners and force them to license their works to government favored entities at rates set by the government. Economists and policy experts criticize them on the grounds that (1) the supposed cost savings such licenses are intended to deliver in the short term are usually more than offset by the inefficiencies that they cause over time; (2) they limit the diversity of services that would ordinarily develop via marketplace licensing; and (3) because the rates and restrictions quickly become outdated and are difficult to change, they are subject to "legislative lock-in" and result in price stagnation. This latter point about legislative lock-in is amply demonstrated with respect to the renewal of the Satelite Television Extension and Localism Act ("STELA").

Accordingly, my message to you is that given the creative and compelling works and the new and innovative distribution models that exist today, there is no need to regulate in this sector by imposing new compulsory licenses or renewing STELA. Indeed, many of my members, to a greater or lesser extent, believe that the existing cable and satellite compulsory licenses are an anachronism. As a result we see no present justification for expanding the compulsory licenses provided in the Copyright Act, or for renewing STELA.

Testimony of Sandra M. Aistars, Executive Director, Copyright Alliance
Before the Committee on Energy and Commerce
Subcommittee on Communications and Technology
Innovation Versus Regulation in the Video Marketplace

September 11, 2013
Summary of Testimony

The Copyright Alliance is a non-profit, public interest and educational organization of artists, creators, and innovators of all types. Our members include artist membership organizations and associations, unions, companies and guilds, representing millions of creative individuals. We also collaborate with and speak for thousands of independent artists and creators and small businesses who are part of our One Voi©e grassroots group.

Our testimony focuses on three topics

- the investments being made by talented men and women across the country in order to produce creative works with high production values
- the innovation occurring in the video marketplace; and
- legal guideposts for the Subcommittee to consider from a copyright law perspective

Creating audiovisual works with high production values is an expensive proposition whether you are an independent documentarian, a major motion picture studio, or a television production company. The work is labor and talent intensive, and can carry commensurately large costs. Creators large and small take big financial risks in developing their works. Encouraging them to keep creating will require respecting their choices in how they distribute their works.

Happily, because creators are pursuing diverse modes of distribution, audiences have more choices than ever before for viewing films and television programs. Services such as Netflix, Hulu, VUDU, HBOGO, Crackle, MUBI, Amazon, and EpixHD; devices such as AppleTV and Roku; and technologies such as UltraViolet enable consumers to watch what they want, when they want, where they want.

Copyright law recognizes that ensuring appropriate rights to authors drives innovation and benefits society. Ensuring the author's right to control the distribution of his or her works is key to these societal benefits.

Compulsory licenses are an extraordinary departure from normal copyright principles which ensure that creators have the right to distribute their works how they see fit. They are appropriate only in narrow circumstances to address market failure.

Given the creative and compelling works and the new and innovative distribution models that exist today, there is no need to impose new compulsory licenses in the video marketplace or to renew STELA.

Mr. WALDEN. We thank you for your testimony. And now we will go to R. Stanton Dodge, Executive Vice President and General Counsel of the DISH Network, LLC.

Mr. Dodge, good to have you back before our committee. We look forward to your testimony.

STATEMENT OF R. STANTON DODGE

Mr. DODGE. It is nice to be here. Chairman Walden, Ranking Member Eshoo, and members of the subcommittee, and appreciate the opportunity to testify today.

My name is Stanton Dodge and I am general counsel of DISH Network the Nation's third-largest paid TV provider and the only one to offer local television service at all 210 local markets.

Since this is not the first hearing on the subject, I would like to cut right to the chase. The retransmission consent process is broken and in need of targeted reform. In the past few years, we have seen an escalating number of blackouts, and these blackouts are lasting longer than in the past and impacting millions more subscribers. So not only are takedowns occurring more frequently, they are also increasing in magnitude. The recent headlines about the CBS/Time Warner Cable dispute serve as a stark reminder.

In short, the retransmission consent problem has reached a crescendo. It is perhaps the most destructive and outdated remnant of the 1992 Cable Act and does not match up with the vibrant, ever-changing, competitive landscape in today's video marketplace.

Also of increasing concern, some broadcasters are coordinating their negotiations with each other and colluding on the rates that they demand from video distributors like DISH. The American Television Alliance, known as the ATVA, whose membership encompasses cable, satellite, and Telco providers, independent programmers, and public interest groups and of which DISH is a member, is unified in calling for targeted changes to the outdated retransmission consent rules as part of the STELA reauthorization.

We and many other members of ATVA have voiced support for proposals such as interim carriage, and this solution would temporarily permit a distant signal to be imported during a retransmission consent dispute. That measure would alleviate the problem of service disruptions and prevent the use of consumers as pawns. And the broadcaster whose signal is imported will be compensated under the already-established distant signal royalty rate. If the broadcaster's local content is as valuable to consumers as they assert, then the imported distant network is an imperfect substitute and both parties will continue to have sufficient incentives to reach an agreement. The imported distant network signal simply fills the void for network programming.

Members of the ATVA have also expressed interest in a discussion of standalone broadcast station offerings, which would give consumers the choice of whether to pay separately to receive a particular local broadcast station. And some in ATVA support the deregulatory approach embodied in Congressman Scalise's legislation from the 112th Congress. When he released his bill, ATVA and DISH lauded Mr. Scalise for his leadership in kick-starting the much-needed retrans reform debate. We continue to encourage Mr. Scalise's reform efforts.

And today, we applaud Ranking Member Eshoo for circulating the Video CHOICE Act this past Monday. Critically, the discussion draft proposes concrete legislative ideas to give consumers greater choice over their programming, tackles the growing problem of funding cable channels with network channels, and empowers the FCC with significant authority to curtail blackouts.

And we were pleased with Chairman Walden's announcement last night that he expects to circulate a discussion draft on issues impacting the video marketplace no later than the first quarter of next year. We look forward to working with Chairman Walden, Ranking Member Eshoo, Congressman Scalise, and the entire subcommittee to ensure that meaningful legislation is passed this Congress.

As one can see, there are many ways to address the broken retransmission consent system, but without immediate action from Congress, it is likely that the blackout problem will continue to escalate, millions more screens will go dark, prices will increase, and consumers will suffer. The time to act is now.

Thank you and I look forward to answering your questions.

[The prepared statement of Mr. Dodge follows:]

Testimony of

R. Stanton Dodge

Executive Vice President and General Counsel of DISH Network L.L.C.

on

"Innovation Versus Regulation in the Video Marketplace"

before the

House of Representatives

Committee on Energy and Commerce

Subcommittee on Communications and Technology

September 11, 2013

Chairman Upton, Ranking Member Waxman, Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the General Counsel of DISH Network, the nation's third largest pay-TV provider and the only provider of local television service in all 210 of this nation's local TV markets.

The broken retransmission consent regime is in dire need of comprehensive reform. In the past few years we have seen an escalating number of blackouts arising from impasses in negotiations between the broadcasters and their distributors. And, these blackouts are lasting longer than in the past, and impacting millions more subscribers. The recent headlines about the CBS service interruption during its dispute with Time Warner Cable serve as a stark reminder. The retransmission consent problem has reached a crescendo. It is the most severe crisis since Congress decided to give broadcasters a retransmission consent right in the 1992 Cable Act. This is the most destructive and outdated remnant of the 1992 Act and does not match up with the vibrant, ever-changing, competitive landscape in the modern video marketplace.

The American Television Alliance ("ATVA"), whose membership encompasses cable and satellite providers, independent programmers, and public interest groups, and of which DISH is a member, is unified in calling for targeted fixes of these outdated retransmission consent rules as part of the STELA re-authorization.

We and many other members of ATVA have voiced support for proposals such as interim carriage authority, which would temporarily permit a distant signal to be imported during a retransmission consent dispute. That measure would alleviate the problem of service disruptions

and prevent the use of consumers as pawns. And, the broadcaster whose signal is imported will be compensated under the already established distant signal royalty rate. If the broadcaster's local content is as valuable to consumers as they assert, then the imported distant network is a poor substitute, and both parties would continue to have every incentive to reach an agreement. The imported distant signal simply fills the void for the network programming.

Others in ATVA have expressed interest in a discussion of standalone broadcast station offerings, which would give consumers the choice of whether to pay separately to receive a particular local broadcast station. And some in ATVA support the deregulatory approach embodied in Rep. Scalise's legislation from the 112th Congress. ATVA lauded Rep. Scalise for his leadership in starting the necessary debate about the need for comprehensive reform.

Today, we applaud Ranking Member Eshoo for introducing the Video CHOICE Act. Critically, the discussion draft proposes concrete legislative ideas to give consumers greater choice over their programming, tackles the growing problem of bundling of cable channels with network channels, and empowers the FCC with significant authority to curtail blackouts. We look forward to working with Ranking Member Eshoo and the Subcommittee to ensure that meaningful legislation is passed this Congress.

As one can see, there are many ways to address the broken retransmission consent system. Without immediate action by Congress, it is likely that the blackout problem will continue to escalate, millions more screens will go dark every year, and consumers will be forced to pay more and more for their cable and satellite service as a result. The time to act is now.

This afternoon, I will briefly review the origins and purpose of the retransmission consent system, and then outline one solution that can be implemented to avoid consumer disenfranchisement and abuse of the 1992 retransmission consent right.

But first, let me say a few words about DISH. DISH employs over 25,000 people across the country and is a leader in innovation, having rolled out advanced place shifting and DVR functionality that provides our customers with the ability to view their content where, when, and how they want it. To stay relevant, we must continue to adapt to our customers' evolving preferences, and we believe that the only way to do that is to embrace innovation and change as a company. And our laws, which set the framework for a competitive video marketplace, must do the same.

The Broken Retransmission Consent Regime Leaves Consumers in the Dark – Literally

In 1992, Your Regional Cable Operator Was the Only Game in Town. The broadcasters' retransmission consent right did not always exist. Congress created it and gave it to the broadcasters in the 1992 Cable Act. Before that time, distributors could simply retransmit local stations under the cable statutory license of Section 111.

Back then, we lived in a different world. Most markets were served by only a single cable company. Satellite wasn't an option, unless you wanted to install a 3-meter dish in your backyard. The Internet was in its infancy. If we had a mobile device, it was probably the size of a brick. All these years of progress later, with increased competitive forces now at play in the video marketplace, it is difficult to look at the laws on the books and tell that much has changed. Except for its extension to the satellite arena, the retransmission consent system remains largely the same two-plus decades later.

Today, Networks Leverage Their Monopolies to Play Distributors Against Each Other.

In most places today, multiple distributors using a traditional distribution model (the cable company, two satellite providers, and often a telco) compete for customers. This is not to mention over-the-top providers such as Netflix, Amazon, and Hulu, which are potential or present competitors, too. The multiplicity of distributors has a significant implication under the current retransmission consent regime. Network stations play providers against one another. Instead of a broadcaster and a single regional cable operator engaging in a relatively fair fight and coming to terms on a reasonable retransmission fee, networks threaten to pull their programming, effectively (and sometimes affirmatively) pushing consumers onto other providers' systems – providers that may have given in to the same unreasonable demands of the broadcaster. In contrast to the cable and satellite providers, each broadcaster effectively owns a monopoly in its given market. No other station in the market can offer the same network programming by virtue of the network system of exclusive franchises. Consequently, the broadcasters have the luxury of threatening to withhold their programming altogether in order to extract higher and higher retransmission consent fees. The result: broadcasters leverage their government-protected exclusive network franchises by means of their government-created retransmission consent right.

The problem is exacerbated by the increasing consolidation we have seen in the broadcasting industry. In the last four months alone, acquisitions have preoccupied the industry, with the Sinclair Group seeking to increase its holdings from just over 100 stations to almost 150; Gannett proposing to acquire Belo Corporation to bring Gannett's holdings of local broadcast stations to 43; Tribune acquiring Local TV Holdings to bring its total station ownership to 42; and Media General and New Young Broadcasting announcing their intention to

merge and combine ownership of their 30 broadcast station affiliates. This consolidation further imbalances the market, as multiple markets are presented to carriers with take-it-or-leave-it propositions for extraordinary rates. We are seeing increased fee demands of between three and six hundred percent when compared to just three years ago, when Congress last acted and passed STELA.

There are also serious antitrust issues that arise when broadcasters enter into arrangements to jointly negotiate retransmission consent deals. For example, in 2012, DISH was forced to black out three Big-4 stations in Casper, Wyoming and two Big-4 stations in Cheyenne, Wyoming. Although the five stations were ostensibly owned by three different entities, DISH was required to negotiate with a single appointed representative for all five stations. After negotiations broke down, the blackout lasted for 4 months. The consolidation of so much local broadcast programming under one negotiator gives the broadcasters inordinate additional leverage, precipitating and prolonging the blackouts for DISH subscribers.

Consumers Are Getting Left in the Dark. The result: consumers are being left in the dark—literally. To gain leverage during retransmission consent negotiations, broadcasters increasingly pull their signals, resulting in blackouts of major television networks. Cable, satellite, and telco subscribers are deprived of key network programming, along with important local safety, emergency, weather, and news information, precisely what the broadcasters claim is their public interest charge. And the problem is worse than ever.

These blackouts are affecting more consumers in more markets than ever before. The proof is in the numbers. In 2010, there were 12 instances where a broadcast signal was blacked out in a local TV market. In 2011, there were 51. In 2012, the number soared to almost 100 blackouts affecting millions consumers. And the pace has yet to level off. In 2013, we're on

track for 120 blackouts. Like most snowballing crises, individual incidents are increasing in severity. In this case, the blackouts are increasing in length. The longest blackout lasted only 24 days in 2010. In 2011, there were 16 blackouts lasting over 24 days. Last year, there were 30 blackouts that lasted over 24 days, two of which lasted 121 days. And the CBS blackout lasted over four weeks, affecting more than 3 million consumers in some of the nation's largest markets. During the blackouts, CBS even barred Time Warner Cable's Internet customers, some of whom had third-party video providers such as DISH, from accessing full episodes of CBS programming on the Internet. Like many blackouts, the dispute coincided with a marquee event—in this instance, the anticipated start of the NFL season.

In the past, subscribers' access to the World Series and the Oscars has been threatened by broadcasters' brinksmanship. Ultimately, the losers in these one-sided contests are the consumers who get their programming pulled from them by the broadcasters and then see their bills on the rise as a result of ever-increasing broadcaster price demands. Some broadcasters have floated the idea of becoming a cable channel, thus stopping the broadcast of their channels over the air. If the broadcasters choose to do that, they should give back all of their free government-granted broadcast spectrum, must carry rights, and other public subsidies.

Congress Can Fix the Problem. Among other things, Congress can restore balance to the negotiating table by temporarily allowing cable and satellite carriers to substitute a distant network signal from a non-local market during an impasse in retransmission consent negotiations with a local market affiliate of that same network. This approach has broad support from across the industry and public interest groups.

Here is how the proposal would work: If a broadcaster blacks out, for example, the local Denver NBC station, the cable or satellite provider would be able to temporarily offer

subscribers an out-of-market station, such as the Cheyenne NBC station. The replacement station will not be a perfect substitute for the blacked-out local station, since consumers won't have their local content, but at least people will be able to receive network programming. And, the broadcaster whose signal is imported will be compensated under the already established distant signal royalty rate.

Additionally, this solution will introduce some competition into the marketplace—just as pay-TV providers face competition from one another that mitigates against dropping broadcast programming. Here the broadcaster would face some degree of competition from a network affiliate in another market. The local broadcaster might think twice before pulling its signal from cable or satellite subscribers. Consumers will benefit.

Today's Laws Should Reflect Today's Marketplace, A Marketplace in which DISH is Prepared to Compete

The video industry is a place where the marvels of yesterday have become commonplace today. The needs and desires of consumers are evolving to keep pace with the options that new technology makes available to them. Our laws should also evolve to create a framework that facilitates the functions of the free market. This framework would help providers to give American consumers what they want: the content that they want, when they want it, and how they want it. Consumers want to watch their programming of choice on their television sets, on their phones, and on their tablets. They also want to surf the web or make a phone call—no matter where they are. When we look at the marketplace for video, we need to be able to provide all of those options to every one of our customers, and we need to do it anywhere, anytime, on any device.

Our company is moving to meet this need. By rolling out technological innovations like the Hopper with Sling, our customers can use a smartphone or tablet in a controlled and private

manner to enjoy the video content for which they have already paid. Our new PrimeTime Anytime and AutoHop functionality take the DVR to a new level. Consumers can, at their option, enable these features to gain the ability to more easily view their preferred programming when they want, while skipping what they don't want to see.

These are some of the ways in which we have responded to our customers' changing needs. But we have further to go. In the past, we haven't shrunk from "betting the company," so to speak, in order to stay competitive. We went from selling big dishes to launching our own small-dish DBS business. To give customers what they want, including mobile video, voice, and data, we are taking a risk again. Recognizing the evolution in video, DISH is on its way to becoming a wireless service provider. We acquired satellite spectrum and, after almost two years, secured FCC approval to use that spectrum for terrestrial mobile broadband services. We now want to compete against the established players by offering video, voice, and data inside and outside the home, from a single platform.

DISH is driven to provide consumers with all that they want, including the choice in services and providers that they seek. If we are successful, we will fuel billions of dollars in investment and create tens of thousands of new jobs throughout the United States. But just as businesses must foster change in a rapidly evolving video marketplace to keep pace with what consumers want, government should work to ensure its regulations mirror today's competitive realities, consumer expectations, and advances in technology.

Thank you. I look forward to answering any questions you may have.

Mr. WALDEN. Thank you, Mr. Dodge. We appreciate your comments and testimony, as always.

We will now go to Mr. Edward L. Munson, Jr., Vice President and General Manager, KPHO Television.

Mr. Munson, we are delighted to have you here. We look forward to your comments.

STATEMENT OF EDWARD L. MUNSON, JR.

Mr. MUNSON. Good afternoon. I am honored to be here, sir.

My name is Edward Munson. I am the vice president and general manager of KPHO–TV in Phoenix, Arizona. KPHO is owned by the Meredith Corporation. We have 13 stations across the country in places like Portland, Oregon; Nashville, Tennessee; and Flint and Saginaw, Michigan. I am here today representing the National Association of Broadcasters.

The topic of this hearing, "Innovation Versus Regulation in the Video Marketplace," touches on two concepts that are part and parcel to being a local TV broadcaster. TV stations exist in a highly regulated environment, more so than the other witnesses on this panel. In fact, broadcasters must comply with regulations not applicable to any other distribution platform.

For instance, TV stations must abide by decency rules and children's programming requirements. We must give Federal candidates reasonable access to air campaign advertisements, and we must offer those spots at the lowest charge to any of our commercial advertisers. We must maintain main studios within certain geographic limits and with specific staffing obligations, submit numerous quarterly, annual, and biannual reports to the FCC, and compile quarterly lists of station programming.

We proudly embrace many of these responsibilities but some regulations place broadcasting at a competitive disadvantage to the other video providers on this panel. For example, decades-old ownership restrictions reflect a time when broadcasting was the only game in town. It makes no sense to hamstring broadcasters with outdated limitations when our direct competitors are not restricted in any way.

Another example is the online public file regulation which requires local TV stations to place sensitive pricing information online when our direct competitors can see it, but these direct competitors don't have that obligation. These types of regulations, fundamental fairness requires regulatory parity for the benefit of competition and consumers.

Based on our fundamental obligation to serve the public interest, some in the pay TV industry are arguing that a programming dispute means broadcasters are somehow not serving their local communities. In the rare event that a broadcaster has a dispute with one pay-TV company in a market, consumers have multiple other options to get their video programming. We understand that many of you are concerned about the impact these disputes have had on your constituents, and we share that concern. This is why it is important to remind this committee that no broadcaster has ever stopped broadcasting because of a dispute with a pay-TV provider. We are never off the air or blacked out. Our signals are always being broadcast and they are always free.

Over my career, I have personally been involved in many successful carriage negotiations with companies like CenturyLink, Suddenlink, and Mediacom. My experience, like the experience of nearly the entire broadcast community, is that deals get done all the time. Of course you don't hear about the ones that go smoothly; you hear about the handful that don't. And there is no doubt that the Time Warner/CBS dispute was unfortunate. But it was predictable. The dispute seems almost orchestrated out of the DC lobbying playbook: create a crisis; then run to Congress to fix your crisis in your favor.

The pay TV industry will tell you carriage impasses have dramatically increased, that the retrans system is broken and needs to be fixed. Honestly, this is a bit disingenuous. In a few instances where agreements have not been reached in the last 2 years, there is the distinct and disturbing pattern: 89 percent of the disputes have involved only three pay-TV companies: Time Warner Cable, DISH, and DIRECTV, nearly 9 out of 10 disputes. That suggests to me there is not a problem with the process; there is a problem with the players. And we shouldn't be rewarding bad behavior.

It is not a coincidence that these are the very same companies pressing Congress most aggressively for government intervention. These pay-TV companies have ratcheted up their efforts for government involvement in retransmission consent negotiations because, despite having very healthy margins and soaring stock prices, they are looking to Congress to help control their programming costs. But pricing decisions are best left to the marketplace.

Similarly, the government should have no role in deciding when, how, or where an owner of video content distributes that content. These carriage agreements are increasingly about the digital rights for our popular programming. We want to make sure the consumers using new and innovative platforms can access our content, which, in turn, fosters more competition in the video marketplace.

In conclusion, television broadcasters provided the most-watched media out there by a wide margin. We are not running to Congress to ask for preferential treatment in our negotiations or for any legislative changes to benefit our side. We want to negotiate freely in the market for the value of our content. We only ask that Congress not tip the scales in favor of one industry.

Thank you and I look forward to your questions.

[The prepared statement of Mr. Munson follows:]

Hearing on
"Innovation Versus Regulation in the Video Marketplace"

United States House of Representatives
Committee on Energy & Commerce

Subcommittee on Communications and Technology

September 11, 2013

Statement of Edward L. Munson, Jr.

On behalf of the
National Association of Broadcasters

Good morning Chairman Walden, Ranking Member Eshoo and members of the Subcommittee. My name is Ed Munson and I am the Vice President and General Manager of KPHO-TV in Phoenix, Arizona. KPHO is owned by the Meredith Corporation, which owns 13 television stations in 10 markets. I am testifying today on behalf of the National Association of Broadcasters.

The title of this hearing, "Innovation Versus Regulation in the Video Marketplace," touches on two concepts that are part and parcel to being a local broadcaster. Broadcasting is a heavily regulated industry. It is, in fact, by far the most regulated industry on this panel. These regulations stem from what some have characterized as a "social contract" between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers. Broadcasting is also an innovative industry. We helped drive the digital video revolution, are building mobile platforms and are pushing our content out wherever we can, but to maintain service, our content must be protected.

In my comments here today, I want to talk about both of those concepts – regulation and innovation – and how they shape the broadcast industry. But I'd like to start with where we should start – how broadcasters have served and continue to serve the public interest. What does serving the public interest mean?

Serving the public interest means investing in the weather detection systems and providing around the clock updates as natural disasters threaten communities. This is what broadcasters in Oklahoma did last May during that state's destructive tornados. Broadcasters in helicopters tracked the tornadoes up and down city streets so residents would know to take cover. And broadcasters all across the West have informed

communities of the real time threats to homes and communities by the devastating wildfires that can change direction in an instant and destroy lives and property. Broadcasters in the Midwest are there when rivers flood, and broadcasters along the eastern seaboard are there to help people find safe ground when hurricanes are threatening.

And while informing and serving the public is what differentiates us from other entities that provide video programming, what also differentiates us are the regulatory burdens under which we operate. While we gladly and proudly embrace many of these responsibilities, some regulations can place broadcasting at a competitive disadvantage with respect to the other video providers on this panel. In fact, broadcasters must comply with many regulations that are not applicable to any other distribution platform.

For example, only broadcasters are subject to potential fine for airing arguably "indecent" material. This regulatory imbalance and the potential fines, which can be very significant, have the effect of chilling broadcast speech (including coverage of live news events) and even limiting content options. Some in the creative community develop programming only for less regulated outlets, such as pay television.

In addition, ownership limitations clearly can put broadcasting at a competitive disadvantage. Decades-old ownership restrictions reflect a time when broadcasting was the only game in town. This hearing and my fellow witnesses are testimony to the fact that times have changed dramatically. It is irrational to hamstring broadcasters with outdated limitations when our direct competitors are not restricted in the same way. In this regard, it is notable that even though Congress required the FCC to adopt horizontal and vertical ownership limits on cable operators, there are in fact no such

limits. We also observe that the top ten pay-TV providers control 91.5 percent of the multichannel video programming distribution market, up from 67.4 percent in 2002, and are even further concentrated regionally and locally as well.

Other rules – like the new online public file requirement – suggest regulators still see broadcasters in isolation of their competition. That rule, among other things, requires local broadcast television stations to place sensitive pricing information online when our direct competitors, including local cable system operators, are not so required Again, there is no reason why local broadcasters alone should be burdened with these requirements. For structural or administrative regulations like these, fundamental fairness requires regulatory parity. Otherwise, the government is artificially altering the marketplace to the detriment of competition and, ultimately, all consumers.

Local broadcasters, like Meredith accept, of course, that we are part of a special service. Certain programming requirements show how we differ from our competition. For example, every full-power television broadcaster is required to air three hours of core children's educational programming each week per channel (i.e., including multicast channels). Broadcasters are also required to give candidates for federal office "reasonable access" to air advertisements on their channels during campaigns. And they are required to offer those spots at the lowest rate – not the average rate – they charge their commercial advertisers. In comparison, while cable and satellite operators may have some obligations, non-broadcast networks and over-the-top video providers, like Netflix, have no similar programming requirements.

The list of mandated obligations is lengthy. For example, broadcasters must maintain main studios within certain geographic limits and with specific staffing

obligations; submit numerous quarterly, annual and biennial reports to the FCC; and compile quarterly lists of stations' programs providing the most significant treatment of issues of importance to their communities. But, I am not here to identify all these requirements. While many broadcasters and NAB have argued that some of these regulations in their current form are outdated or unnecessarily burdensome compared to their public benefit, as a general matter, we embrace the fact that broadcasting is a different kind of service than the others represented on this panel.

Broadcasting is still the fundamental foundation of video distribution in the United States. Cable operators built their businesses on the backs of broadcasters and for years have raised their subscription prices well beyond the rate of inflation. And at the end of the day, for families that would rather pay for food than CNN, local broadcast stations provide a high-quality news and entertainment alternative at the ultimate bargain price -- free. It is remarkable in our hyper-competitive market that anyone can still access the best NFL games, local news and the Tonight Show every week for free just by putting a metal stick on your roof. In fact, consumers can now receive more free channels than ever before. Broadcasters' investment in multicasting has allowed a proliferation of channels, including those providing foreign language programming and new networks focused on serving African-American viewers, such as Bounce TV. Many of these newer multicast channels are not even carried on pay services. This is what broadcasting provides, and will continue to provide for many years to come.

While our core mission has not changed, broadcasters know that they must evolve their service to meet the changing demands of the marketplace. As the most efficient delivery mechanism for video programming, broadcasters are intent on using

the airwaves in a multitude of ways to give viewers the programming they want both now and into the future. To meet the demand for mobile video, for example, broadcasters continue to roll out Mobile DTV, which delivers local full-motion digital broadcasts on multiple mobile devices without using additional spectrum. And because Mobile DTV relies on the existing broadcast infrastructure, we can offer this service without running up consumer cell phone bills or exhausting the data caps that wireless companies are imposing on their customers.

To help deliver mobile television to the masses, Meredith is part of a joint venture known as Mobile Content Venture (MCV), which also includes Fox, NBC, ION and Pearl Mobile DTV. In addition to Meredith, the Pearl member companies include: Belo Corporation, Cox Media Group, E.W. Scripps General, Inc., Gannett Broadcasting, Hearst, Media General, Post-Newsweek Stations, Inc. and Raycom Media. MCV and its participants provide content to portable devices using broadcast spectrum including live local and national news, sports and entertainment programming.

In addition to Mobile DTV, NAB member companies are working to deliver broadcast programming in new and innovative ways. Meredith's local broadcast stations' websites deliver news to the tune of 58 million page views and nearly 5 million unique visitors every month. ABC recently launched a Watch ABC application that will enable broadcasters to deliver local ABC-owned stations on mobile and Wi-Fi networks. NAB and CBS have invested in a company called SyncBack whose technology allows broadcasters to stream local channels to viewers based upon a viewer's geographic location. Broadcasters are also creating new relationships with over-the-top video providers like Netflix, Amazon Prime and Roku to give consumers even more options for

consuming our content. And we are exploring and investing in technological innovations such as 3D, 4K and Ultra High Definition transmissions. As the FCC initiates the incentive auction process and the subsequent repacking of broadcast stations, it is imperative that the Commission do nothing that will jeopardize the one industry on this panel that brings these innovative and essential services to consumers – free of charge.

Broadcasters recognize that consumers want the flexibility to use any device to watch video programming, and we want our programming to be everywhere the consumer wants it. To achieve this goal, content producers need assurances that their programming will only be used with their consent. Regardless of whether broadcasters are providing content to cable and satellite companies or to new over-the-top competitors, the retransmission consent regime appropriately allows broadcasters to negotiate in the free market for the value of the broadcast signal. As Congress noted in 1992, "broadcasters must be allowed to control the use of their signals by anyone engaged in retransmission by whatever means."

While we have recently seen a high profile negotiation that took a month to resolve, I want to reinforce that by no means does this suggest the retransmission consent system needs revision. To the contrary, thousands of deals have been completed over the last two years with no programming interruption. However, some of those calling for Congressional intervention in retransmission consent are correct on one point - a clear and disturbing pattern is emerging. In the last two years, three pay-TV companies have been involved in nearly nine out of every 10 retransmission dispute. Those companies are Time Warner Cable, DISH and DirecTV. It is not a coincidence that these are the companies pressing Congress and the FCC most aggressively to tip

the marketplace for broadcast signals in their favor. Their tactics are straight out of the "How to Win in Washington" playbook – create a "crisis," yell loudly about the crisis and then ask Congress to fix the crisis in your favor.

Congress should resist this cynical ploy by cable and satellite companies and refuse to intervene in a free marketplace. These pay-TV companies have ratcheted up their efforts for government involvement in retransmission consent negotiations because, despite having very healthy margins and soaring stock prices, they are looking to Congress to reduce their costs (and thereby increase their revenues). The government should have no role in setting prices or telling a content owner how to distribute their content. Yet that is precisely what many in the pay-TV industry are asking Congress to do from proposed standstill requirements to allowing the importation of distant signals. Those companies that invest billions of dollars in the creation of quality, popular content should hold the ultimate decision as to how, when and where that content is distributed. Broadcasters strongly believe that matters of price and value are best left to the marketplace – especially when viewers would not benefit from government interference in retransmission consent compensation negotiations. After all, if government interference reduced the fees that cable and satellite providers pay to local stations, there is no assurance – absent binding requirements such as regulation of the rates that pay-TV operators charge to consumers – that any savings would be passed on to viewers.

There is no doubt that disputes with pay television providers, rare as they are, are unfortunate and have an impact on all parties involved. Broadcasters lose advertising revenue, cable and satellite companies lose viewers, and most importantly,

viewers subscribing to a pay-TV service lose access to the most popular shows on television. We understand that many of you are concerned about the impact these disputes can have on your constituents. We share that concern, and want to remind this Committee that no broadcaster has ever stopped broadcasting because of a dispute with a pay television provider. Our signals are always on, always there and always free. If the concern is to protect pay TV subscribers, the remedy is to allow those subscribers to have ready choice by, for example, limiting pay TV operators' early termination fees or allowing for consumer refunds in the rare event that disputes arise.

Broadcast television remains the most popular programming in the country and it is a fundamental part of the future video ecosystem. Broadcasters take seriously the responsibility we have to inform, alert and entertain our viewers. We intend to continue delivering our programming in each and every way any viewer might want to access that programming.

Mr. WALDEN. Mr. Munson, thank you for your testimony. And we will get to those very soon.

We will now go to David Rozzelle, Executive Vice President, Suddenlink Communications.

Mr. Rozzelle, thank you for being here. We look forward to your testimony, sir.

Mr. ROZZELLE. Thank you, Mr. Chairman.

Mr. WALDEN. And again, please pull the microphone close and turn it on. Just push the button right there.

Mr. ROZZELLE. Thank you, Mr. Chairman. Good afternoon, Chairman Walden, Ranking Member Eshoo.

Mr. WALDEN. Is it pushed on?

Mr. ROZZELLE. It is. I have a green light.

Mr. WALDEN. There we go. You have to be pretty close to it.

STATEMENT OF DAVE ROZZELLE

Mr. ROZZELLE. OK. Thank you. My name is Dave Rozzelle and I am an executive vice president with Suddenlink Communications, the leading provider of cable video services and broadband internet access to approximately 1.4 million households in second-tier cities, small towns, and rural communities. Thank you for inviting me to testify today.

Speaking first: Innovation. As a company, Suddenlink is a prime example of innovation in the cable industry. We have increased the number of HD channels we offer, we deliver video content to new screens like iPads, computers, and game consoles, and we have a partnership with TiVo to distribute their DVRs directly to our customers. Our broadband service delivers residential customer data speeds in excess of 100 megabits per second in many of the communities that we serve, including some very small rural communities.

From the consumer standpoint, the state of video has never been stronger. Consumers today have many sources for video content. In virtually all locations they can subscribe to cable television, DIRECTV, or DISH and get 100 or more HD channels and the ability to record and watch at their convenience on the DVR. In some markets, they can also choose service from AT&T U-verse, Verizon FiOS, CenturyLink's Prism TV, or Google Fiber. They can watch online video from a myriad of sources, including Netflix, Amazon, iTunes, and Apple TV, to name just a few.

Also, consumers can access video on an increasingly wider range of devices. Cable TV everywhere lets consumers watch video on their laptops, tablets, and smartphones. Sprint offers its cellular subscribers access to popular programs from networks like Comedy Central, Style, Discovery Channel, and more.

The path to continued growth for cable is to enhance and expand its customer's use and enjoyment of our networks. Cable is investing billions annually to ensure that this potential can be realized, and as a result, other providers of content, services, or devices in the online video ecosystem can flourish. Our partnership with TiVo is an example of such efforts.

In contrast to this dynamic growth change and innovative nature of the video marketplace I just described, our Nation's communication laws have remained largely the same. Video distributors are subject to a range of different statutory and regulatory regimes.

While some regulatory differences are grounded in distinctions that warrant particular treatment, others echo outdated notions of market power. Twenty years ago, cable served 98 percent of all multichannel video households. Today, cable serves 56 percent. Many of the regulations adopted in the early years of cable video service linger and are no longer justified.

Two areas ripe for reform are retransmission consent and the so-called navigation device integration ban. When the retransmission consent regime was first enacted, broadcast stations could only reach viewers off air or through cable systems. Today, the multiple MVPD environment has substantially increased the leverage that broadcasters can exert in retransmission consent negotiations by playing one video provider off another. Their leverage is exacerbated because broadcasters still control marquee events and because the network affiliation structure guarantees that in almost all circumstances only one provider will be available to local viewers.

In retransmission consent disputes consumers bear the brunt of this imbalance. The number of RTC-related shutdowns increased from 12 in 2010 to 51 in 2011 to 91 in 2012. Policymakers need to take a fresh look at retransmission consent in today's marketplace.

Similarly, whatever justification there was for the integration ban has long since been superseded by market developments. Cable operators are required by FCC rules to use a separate security module and set-top boxes they lease to customers instead of being able to integrate the security and channel-changing function of those boxes. This integration ban, which applies only to cable, has cost operators/consumers more than $1 billion since it went into effect in 2007 and wastes hundreds of millions of kilowatt hours per year. It imposes a material unnecessary cost on cable video services when programming costs increases have stressed many household video budgets in recent years.

How should legislative change be affected? While the targeted changes I just mentioned would improve the consumer video experience, the basic framework of the Act can remain in place. Congresswoman Eshoo's draft bill is an excellent example.

Thank you again for the opportunity to appear today and I welcome any questions that you may have.

[The prepared statement of Mr. Rozzelle follows:]

TESTIMONY OF DAVE ROZZELLE

EXECUTIVE VICE PRESIDENT
SUDDENLINK COMMUNICATIONS

on

INNOVATION IN THE VIDEO MARKETPLACE

before the

Subcommittee on Communications and Technology

Energy and Commerce Committee

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

September 11, 2013

Good morning Mr. Chairman and Members of the Subcommittee. My name is Dave Rozzelle, and I am an Executive Vice President with Suddenlink Communications. Thank you for inviting me today to testify on innovation in the video marketplace. We welcome this important hearing.

Suddenlink is a leading provider of cable video services, broadband Internet access, wireless home networking, wireline phone, online video, and home security services to approximately 1.4 million households in second tier cities, small towns and rural communities primarily located in Texas, West Virginia, Louisiana, Arkansas, North Carolina, Oklahoma, Missouri and Arizona. Suddenlink is purely a distributor of video services to its customers; it does not produce video programming.

Cable Always Has Been an Innovative Force in Video

From its beginning, cable has driven innovation and transformation in the video business. Cable was founded to make broadcasting better – extending broadcast television reception to suburban and rural areas outside the reach of over-the-air signals. Later, we made programming better – breaking the lock of the three-channel universe by investing billions in original content that appeals to specialized audiences as well as the mass market, and building award-winning iconic brands like ESPN, HBO, CNBC, C-SPAN, History and Discovery. We were first to unshackle consumers from "appointment TV" with video on demand and the wide deployment of DVRs.

Suddenlink has expanded the video services it provides to its customers in a number of ways. The number of channels we deliver is far greater than the number we delivered just a couple of years ago. The number of high definition (HD) channels we deliver has grown even faster. We deliver some of our video content to new screens, like iPads, computers and game consoles. We offer a wide variety of set top devices and we have partnered with TiVo to

distribute their DVRs directly to our customers. Some of our customers use their TiVo devices to access Internet video.

When the cable industry turned to areas other than video, the results were similarly innovative. In 1996, Congress wanted telephone competition and cable delivered it. Today, one in three households that have wireline phone service receive it from a cable operator.

And then there is broadband. Where high-speed data service was once the purview only of businesses, cable operators brought broadband Internet service to residential subscribers. To do this, the industry borrowed heavily and took enormous risk by ripping out its one-way analog network and replacing it with a higher capacity, two-way digital platform that made broadband possible. Cable broadband speeds have increased at a 50 percent annual rate[1/] since being introduced in 1996 and are projected to continue on that arc for the foreseeable future. In the case of Suddenlink, we deliver residential customers data speeds in excess of 100 Mbps in many of our service areas, including some very small rural communities. Our business class service is also incredibly robust and more importantly, scalable, which allows us to provide gigabit speeds and beyond at the business customer's request.

Today's Golden Age of Video

From the consumer's standpoint, the state of video has never been stronger. Consumers today enjoy (1) more content; (2) higher quality programs; (3) more variety and diversity in video content; (4) more sources for video content; (5) a greatly enhanced capacity to select, manipulate and record video content; and (6) the ability to access video on an increasingly wider range of devices.

1/ *ARRIS Group Inc. 2012 Investor & Analyst Conference,* Aug. 8, 2012, slide 29, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDc2MTUwfENoaWxkSUQ9NTA4NTk3fFR5cGU9MQ==&t=1.

Public policy always has been concerned about diversity of viewpoints and niche programs for smaller yet passionate audiences. The cable model brought that ambition to fruition. The cable dial runs the gamut – from compelling scripted dramas, situation comedies, educational content and kids programming to sports, cooking shows, and news and public affairs.

If you are itching to watch video, the number of sources you can turn to has grown exponentially as different providers compete for your business. You may subscribe to cable television and get 100 or more HD channels, the latest premium content and live events, video on demand and the ability to record and watch at your convenience on a DVR. You can get a very similar experience from DIRECTV and Dish. In many markets, you can also choose service from AT&T U-verse, Verizon FiOS, or CenturyLink's Prism TV. And Google Fiber is expanding to more cities.

Cable also is working to bring better video experiences to consumers wherever and whenever they want, offering, for example, applications that allow subscribers to watch their cable service on their iPads. Cable's "TV Everywhere" initiative makes it possible for cable customers to watch video content they have already paid for on their laptops, tablets, smartphones and other portable devices – no matter where they are. And many cable networks allow viewers to access their programming outside the viewers' multichannel video programming distributor ("MVPD") subscription. Sprint, for example, offers its mobile subscribers access to a wide variety of popular full-length video programs from networks like MTV, Nickelodeon, Comedy Central, Style, Discovery Channel and many more.

If that were not exciting enough, Internet-delivered video has ushered in an even greater explosion of choice. By one estimate, real-time video streaming represents 65.2 percent of

downstream Internet traffic in North America during prime time evening hours.[2/] The U.S. online video market attracts an average of 75 million viewers every day and streams nearly 40 billion videos per month.[3/] Revenue from video content delivered over the Internet to televisions "is expected to grow from $2 billion in 2009 to over $17 billion in 2014."[4/] The largest subscription video provider in the country today is Netflix — not Comcast, Time Warner Cable, DIRECTV or any other MVPD.

If market failure is characterized by a lack of new entry, there is clearly no failure in the video marketplace. Companies that stream content are proliferating: Netflix, Hulu, Amazon, iTunes, CinemaNow, network websites, HBOGo, Apple TV, and user-generated or special interest sites like YouTube, Vimeo, and TED.com are a few. In fact, YouTube recently announced a subscription video service.[5/] Some of these services offer multichannel programming like an MVPD; others specialize in entertainment programming, movies, or on-demand content. And many more offerings are anticipated from the likes of Intel and Sony.

Moreover, web video is not limited to a PC screen any more. Analysis of data from Nielsen suggests that 65 percent of Netflix streaming is viewed on television sets.[6/] Computers can connect to big screen televisions; content can be beamed to sets using functions like Apple Airplay; box companies like Roku, TiVo and Boxee can deliver web video to the TV set; and manufacturers like Samsung are making the flat panel TV web-enabled, with apps incorporated for accessing video content. One study estimates that at least 44 percent of U.S. households have

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2/ *Global Internet Phenomena Spotlight 2H 2012 North America, Fixed Access,* SANDVINE INCORPORATED, Nov. 6, 2012.

3/ *US Digital Future in Focus,* COMSCORE (Feb. 2012).

4/ U.S. Dep't of Justice, Competitive Impact Statement, *United States v. Comcast Corp.*, No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266158.htm.

5/ *New Ways to Support Great Content on YouTube*, YOUTUBE (May 9, 2013), http://youtube-global.blogspot.com/.

6/ NCTA analysis of data from *The Cross-Platform Report*, Quarter 2, 2012-US, NIELSEN (Nov 2012).

a television set connected to the Internet, through an Internet-ready TV, game console, standalone Blu-Ray player or smart set-top box connected to their home network.[7/] Smartphones and iPads have proliferated as compelling devices for consuming video content and enjoying second-screen experiences. Of note, when measured together, the share of all hours spent watching streaming video on tablets and mobile phones increased 100 percent in 2012.[8/]

For some consumers, online video offerings are good enough to cut or shave the cord. According to one report, "3.74 million (3.7%) US TV subscribers cut their TV subscriptions between 2008-12 to rely solely on" online video and over-the-air for their video entertainment.[9/] For many consumers, online video has developed as a supplement to their broadly diverse MVPD service. It enables them to add even more of a particular type of video content – whether it be movies or music – to the live events and new programming available from the MVPD. There are still millions of new customers subscribing to cable service for the first time – or returning to it – because of the HD, on-demand, multi-screen and other advanced video offerings our industry makes available.

As always, the cable industry is responding to changes in technology and in the marketplace in order to stay ahead of the curve and provide leading-edge services to its subscribers. The opportunities presented by broadband are great. While there are some challenges, we continue to see great potential in our networks. As an industry, we are investing billions annually to ensure that this potential can be realized by keeping pace with the dynamic marketplace and consumers' changing needs and interests. As a company, Suddenlink just

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7/ Over Half of Adults Watch Video on Non-TV Devices Weekly, LEICHTMAN RESEARCH GROUP, INC. (May 2, 2013), *available at* http://www.leichtmanresearch.com/press/050213release.html.

8/ *Global Video Index, 2012 Year in Review*, OOYLA, *available at* http://go.ooyala.com/rs/OOYALA/images/Ooyala-Global-Video-Index-Q4-2012.pdf.

9/ *The Battle for the AmericanCouch Potato: Online &Traditional TV and Movie Distribution*, The Convergence Consulting Group Ltd. (Apr. 2013), *available at* http://convergenceonline.com/downloads/USNewContent2013.pdf.

completed a $350 million upgrade of our network, over and above the normal capital expenditures we make to keep our network running smoothly and reliably.

Cable's business incentives in today's marketplace are fully aligned with the interests of consumers. The path to continued growth for cable is to enhance and expand its customers' use and enjoyment of the broadband platform we offer. If consumers want to access video content via their laptop, their Xbox, their iPad, or their mobile device, it's our job to make that possible for them. If they want to obtain video content from Netflix, Amazon, Hulu, YouTube, Apple or any other online provider, it's our business to make that possible as well and we are. Given the robust nature of its networks, cable stands to benefit from the increasing demand for Internet video. Suddenlink believes it will remain the Internet access service of choice for the residential homes we pass for the same reason. So while cable operators are developing new services and features that enable their subscribers to access video online and on-the-go, they are also ensuring that other providers of content, services or devices in the online video ecosystem can flourish. Our partnership with TiVo is an example of such efforts.

Differences in Video Regulation

As innovative sources for video content and distribution have emerged and developed, our nation's communications laws have remained largely the same. As a result, participants in the video marketplace are subject to a range of different statutory and regulatory regimes depending on the distribution technology they use. What requirements attach to delivery of the very same program depends on whether it is offered by a broadcaster, cable operator, other MVPD, or online video distributor. Indecency rules also vary depending on whether a program is being shown on a broadcast channel, basic cable, or pay-per-view.

Some of the regulatory differences are grounded in distinctions that warrant particular treatment. Broadcasters, for example, receive free and exclusive use of the public airwaves, and

in return must use this public resource to serve the public interest. Cable operators, as users of communities' local rights-of-way, have obligations to ensure that installation and operation of their facilities does not cause property owners uncompensated damages.

Other regulatory disparities, however, echo outdated notions of market power. Twenty years ago, cable was effectively the sole provider of multichannel video programming service in the country, serving 98 percent of all multichannel households. Today, incumbent cable's share of the multichannel marketplace stands at 56 percent and 4 of the 8 largest MVPDs in the country are non-cable.

And twenty years ago, of course, there was no Internet and no broadband connections capable of delivering high definition video to America's households.

Despite the array of new competition, choice and service offerings for consumers, cable operators continue to be subject to requirements that are based on aging snapshots of the video marketplace. There are rate regulation rules designed to serve as a proxy for market-based pricing, even though most American households have a choice of at least three MVPDs and millions may opt to forego multichannel subscriptions altogether in favor of Internet-delivered video.

There are program access rules designed to nurture facilities-based competition to cable. But cable's main MVPD competitors – DirecTV, DISH Network, AT&T and Verizon – are all some of the largest communications services providers in the nation. These companies hardly need the government's help to remain viable competitors to cable.

There are also content carriage obligations, such as leased access, the usefulness of which has been obviated by the Internet.

In light of the fundamental changes that have occurred in the marketplace over the last 20 years, we applaud Chairman Walden and this Subcommittee for starting the dialog on the appropriate regulatory framework for video services.

What is the Role for Policymakers?

A natural question for this Committee is what type of regulatory framework will best promote consumer choice. There are clearly many provisions in today's communication laws that are outdated and unnecessary. Two areas ripe for reform are retransmission consent and the so-called navigation device "integration ban" that applies to cable operators alone among video competitors. When the retransmission consent regime was first enacted, for example, broadcast stations could reach viewers only through cable systems or over-the-air broadcasting, and it was feared that absent a fair retransmission consent system, over-the-air broadcasters could be forced into extinction. Changes in the video marketplace since 1992 also have skewed retransmission consent negotiations. While those changes have included the development of programming sources that compete with broadcasters, broadcasters still control marquee events. The combination of those events and the availability of DBS and telcos as alternatives to cable has substantially increased the leverage that broadcasters can exert over MVPDs in retransmission consent negotiations. Consumers bear the brunt of this imbalance: the number of retransmission consent-related shutdowns increased from 12 in 2010 to 51 in 2011 to 91 in 2012. And we are at 80 in 2013 – and still counting.

Clearly there is something amiss, and policymakers need to take a fresh look at retransmission consent in today's marketplace. As a starting point, the cable industry has urged the FCC to bar two or more broadcasters in a local market from using Local Marketing Agreements ("LMAs") or other arrangements to jointly negotiate retransmission consent agreements with cable operators and other MVPDs. The FCC's network nonduplication rules

give the local network affiliate a monopoly on the delivery of network service in its area, and often prevent a cable system from reaching agreement with another network affiliate to replace programming lost in a retransmission consent "blackout." Another step would be the repeal of the "must-buy" requirement in the Cable Act, which requires cable operators to include retransmission consent stations on the basic tier that all customers must purchase.

Similarly, whatever justification there was for the "integration ban" has long since been superseded by marketplace developments. Cable operators are required to provide security modules to consumers who buy set top boxes at retail so they can connect and use those boxes to receive cable service – but on top of their obligation to support retail devices, operators are also required by FCC rule to use a separate security module in the boxes they lease, instead of being able to integrate the security and channel changing functions in those boxes. This integration ban – which applies only to cable operators – has cost operators and consumers more than $1 billion since it went into effect in 2007 and wastes hundreds of millions of kilowatt hours per year. As mentioned earlier, Suddenlink's partnership with TiVo is a stand-alone success and is evidence that third party deployment of set top devices is not dependent upon whether Suddenlink deploys traditional cable set top devices without CableCARDs.

There is no doubt that the transformation underway in the video marketplace will not be problem-free. It will be chaotic at times as consumer expectations and demands outpace changes in the underlying marketplace. As market participants seek to realign their business strategies with the new reality, many questions of law and policy may arise. In this dynamic market, it is difficult to know what type of statutory or regulatory changes will promote rather than hinder competition and investment. Indeed, the breadth of the challenge could present high hurdles to consensus and to prudent lawmaking. For these reasons, it is better to exercise caution rather than rush to rewrite laws that will, in any event, be obsolete almost as soon as they are enacted.

As the new marketplace evolves, there may be limited, targeted changes to the Act that are appropriate to address specific issues that arise – and the FCC should have the tools it needs to adjust its rules as the market changes – but the basic framework of the Act can remain in place throughout this transition period, without causing any delay or hindrance to the exciting changes that are occurring in the video marketplace. The time may come when adjustments to the current law can no longer suffice, but that time is not now.

Thank you again for the opportunity to appear today. Suddenlink and the cable industry are proud of the products and services we offer customers today and we are excited about the dynamic future before us. We look forward to being a key player in this vibrant marketplace.

Mr. WALDEN. And we thank you for your testimony and we look forward to the questions and answers.

We will go now to Mr. James Campbell, Vice President of Regulatory and Legislative Affairs, Midwest Region, CenturyLink, Inc.

Mr. Campbell, thanks for being with us.

STATEMENT OF JAMES CAMPBELL

Mr. CAMPBELL. Thank you, Chairman Walden, Ranking Member Eshoo, members of the subcommittee, a special hello to Representative Gardner from my home State. Thank you for giving CenturyLink the opportunity to testify before you today as a relatively new entrant in the video market.

Obviously, content is going to be a big topic today, but I just want to assure you that CenturyLink does not seek to avoid paying for its content but rather to create an environment where we go back to true market-based negotiations. And we actually have two parties that are sitting at the table with some risk and giving something and taking something.

But we have a little background. CenturyLink is the third-largest telecommunications company in the United States. We offer voice, video, and data to over 14 million subscribers in 37 States. We offer the same service to businesses in all 50 States and some select international communities. And recently, with our purchase of Savvis, we are one of the largest cloud computing and data hosting companies in the world combined with our cybersecurity solutions that we offer to the Federal Government and multiple State and local governments. So we are a true global player.

With that, we just recently got involved in the competitive video business in the last 5 years where we have launched our Prism TV in multiple markets, including Colorado Springs, central North Carolina, and most recently in Omaha where we launched a gig service. It is a competitive service and it truly brings a choice to the market.

Consumers benefit from this choice. They get better quality service; they get more innovation, more investment, and ultimately lower rates. Unfortunately, the cost to broadcast content is threatening consumers' ability to receive just any of those benefits.

So the regulatory regime we are looking at was creating an environment when the Federal policymakers were concerned that broadcasters were going to be subject to market abuse by the incumbent cable providers when they had virtually all of the market. Now, today, what was the shield is now used as the sword. So as we face negotiations for retransmission consent, it becomes difficult for us to negotiate, and these rules are used against us in a myriad of ways, including the fact that national content can be forced down our throat along with the local content through tie-in arrangements. We have virtually no other option to get content in these markets. And the FCC's interpretation of the good faith standard has rendered it meaningless, essentially giving further de facto power to the broadcasters. So that the scales that Mr. Munson spoke about our already in the favor of one party over another, and we are simply asking that they be returned to level.

In addition, the regulatory regime does not reflect the explosive competitive nature of the video market and the explosion of com-

petitive providers over a myriad of networks and methods. The current rules not only pose problems for large providers but also more so for small providers like CenturyLink. Every customer we obtain currently has a relationship with someone else. We have to win them over.

And for us to sit and face these types of terms and conditions from broadcasters, I know Mr. Munson said that thousands of these retransmission consent negotiations go smoothly, including with CenturyLink. I doubt there was a lot of horse-trading and haggling in that negotiation. We essentially have to take what we get.

Ultimately, the fees that are being charged are providing windfalls for the corporate broadcasters and not the local stations. Retrans was designed to promote localism and, you know, ensure that there was a safety net for local stations. Now, we have to buy these local stations along with multiple other channels, and we have no choice but to take it because these are products and content that our subscribers need. SNL Kagan projects that by 2018 $6.1 billion will be gained in re-trans fees over 2.4 billion from 2012. That is a 250 percent increase over just two retransmission cycles. And this is all at the expense of consumers that live and work in your districts.

Congress has an opportunity with STELA to reform and return this negotiation process into a true market scenario. We agree with DISH that the carriage of distance signals, if there is an impasse, would be one way to do that. You would essentially return some leverage back to the providers so when we sit down at the table, we both want something. Right now, it is not the case. The reasons Congress conferred the regulatory advantage to the broadcasters no longer exist.

CenturyLink favors a deregulatory approach. Again, distant signals can come in for two reasons: again, it returns the balance of the negotiations to both sides of the table equally, and more importantly, it doesn't punish consumers while two providers try and work out a deal.

To close, at the end of the day, this is not about winners and losers; it is about protecting consumers from the regulatory problems that exist today.

Again, we thank you for the opportunity to be here. We look forward to working with this committee and Congress to come up with a solution that is consumer-oriented. Thank you.

[The prepared statement of Mr. Campbell follows:]

Testimony of

James Campbell
Regional Vice President, Public Policy
CenturyLink

before the
Subcommittee on Communications and Technology,
Committee on Energy and Commerce
United States House of Representatives

September 11, 2013

Mr. Chairman, Ranking Member Eshoo, and members of the Subcommittee, thank you for the opportunity to testify this morning before the Subcommittee regarding *Innovation Versus Regulation in the Video Marketplace*. My name is Jim Campbell, Regional Vice President Public Policy for CenturyLink. As a relatively new entrant in the video market, we hope to bring a unique perspective to the debate about the challenges of obtaining essential broadcast content at reasonable rates under the existing statutory framework.

On the issue of access to content, which for many who are following this proceeding today is a key topic, CenturyLink like others, does not seek to avoid paying reasonable rates for its broadcast content. Rather, we seek fair retransmission consent rules that will not be leveraged against consumers and competitive new entrants. This can be achieved by modernizing the existing regulatory structure to allow newer entrants like CenturyLink to carry national programming from an alternative market during negotiation breakdowns.

CenturyLink background and entry into the video market

By way of background, CenturyLink is the third largest telecommunications company in the United States, offering advanced communications services to over 14 million homes. CenturyLink serves numerous federal, state and local government agencies as well as businesses in all 50 states and select international markets. Our services include voice, broadband, video entertainment and data services. In addition, we provide fiber backhaul and managed cybersercurity solutions. We offer cloud computing on a global basis as a result of our acquisition of Savvis, Inc., one of the largest cloud computing and hosting companies in the

world. Today CenturyLink is a global communications company that provides a variety of advanced services including our more recent entry into the video services market.

Over the past five years, CenturyLink has significantly ramped up its entry into the competitive video market, launching its fully digital IPTV service in twelve markets, including Las Vegas, Phoenix, Orlando, Colorado Springs, Omaha, Tallahassee and central North Carolina. The service delivers high-quality video content, a broad range of on-demand content, and advanced technology and interactive features over a managed two-way IP network, bringing an additional competitive video option to over 1.5 million homes. In fact, we are generally the only facilities-based competitor to the local cable provider in markets we enter. Our company's unique and expansive network footprint provides great potential for our video product to reach a variety of rural and urban markets of all sizes.

Consumers benefit from robust competition. Better service, investment, innovation, and lower prices always result when one or more providers compete for customers. That is true in the video market as well. Unfortunately, while we have seen some slowdown in cable price increases from the incumbent operator in the markets where CenturyLink has launched our competitive service, true competitive pricing has not yet been realized.

Additionally, federal and state policymakers recognize that broadband deployment and cable competition are related and that broadband speeds and adoption increase significantly when it is offered along with video services, which is a benefit to consumers. Ninety percent of our new TV customers also purchase high speed Internet, which resonates well for those who prefer over-the-top streaming video alternatives. From a pure consumer choice standpoint, at least 50 percent of our new IPTV customers are new customers to CenturyLink.

In our IPTV markets, CenturyLink offers broadband speeds ranging from 25 to 40 megabits per second, and in Omaha, where we have launched full gigabit service, those customers are enjoying our video product using incredible speeds over our gigabit network.

The 1992 Cable Act, retransmission consent and changed circumstances

The underlying federal rules that govern cable, satellite and IPTV providers' efforts to obtain broadcast content were largely motivated by Congress' concern in 1992 that local broadcasting was at risk from potential market power abuses by incumbent cable companies who dominated the marketplace at that time. As a result, federal policymakers have deliberately enhanced the broadcasters' position vis-à-vis pay television providers with several key accommodations:

- Under the must-carry rules, any local broadcaster can demand that its local feed be featured in the cable television provider's line-up, even if there is minimal demand from viewers.
- Under the FCC rules, a pay television provider that seeks to provide its customers with the content found on local broadcast stations (and that has not already been compelled to carry those stations under the must-carry rules) effectively has no other option for obtaining such content.
- Congress added a requirement that retransmission consent negotiations be conducted in good faith as part of prior revisions to the satellite compulsory license act. However, the FCC's interpretation and application of that requirement has all but rendered it meaningless, adding significant *de facto* power to the broadcaster position

under the rules, even as consumers have been subjected to signal blackouts with increasing frequency in recent years.

- Ironically, although threatening blackouts on the eve of marquee events like the Super Bowl or the Oscars is a standard tactic for broadcasters, it is actually unlawful under FCC rules for pay television providers to deny viewers access to a signal during "sweeps week," when the pressure is greatest on broadcasters to show good ratings to their advertising clients.

These accommodations were added to the considerable benefit of no-cost spectrum granted by the federal government decades ago to broadcasters, and continually renewed to this day. Unfortunately, the changes made by the 1992 Act did not anticipate the explosion of video competition with traditional cable providers from Direct Broadcast Satellite, other MVPDs, and over the top video providers. DirecTV, DISH, Verizon FiOS, AT&T U-Verse, CenturyLink PRISM™ TV, and more recently, Netflix, Google and Amazon are now all entering markets with the goal of providing consumers alternatives to large incumbent providers.

Twenty-one years later, incumbent cable companies no longer have a monopoly in the video market. Reconciliation of present rules with market realities is needed immediately. While CenturyLink believes that content owners should be reasonably compensated for their content, under the current law, retransmission consent fees are providing windfall profits for the major broadcast networks and owners of multiple broadcast stations rather than a safety net for local stations. These excessive fees eventually hit the wallets of consumers in your districts.

Customers of new entrants become victims of competitive choice

While customers of larger cable and satellite companies are subject to blackouts with increasing frequency, tied carriage and non-negotiable rates create additional competitive hurdles for alternative providers. On the one hand, because CenturyLink is a relatively new video option in most of the markets we serve, we can ill-afford even a small number of subscriber defections should we lose the right to carry a local station. Yet, given the massive capital investments we have made in order to provide consumers with a competitive alternative, we also cannot simply give in to whatever the broadcasters demand – including not only exorbitant rates, but also the tied carriage of additional broadcast and non-broadcast services that are of limited interest to our customers.

While the loss of a signal severely harms a new entrant and its customers, it poses little risk to the broadcaster given its ability to continue to make its programming available to other video programming distributors as well as to transmit it for free over the air and the Internet. And the harm does not end there. Broadcasters often take further advantage of their leverage over new entrants by imposing even more onerous terms than those demanded of incumbent providers.

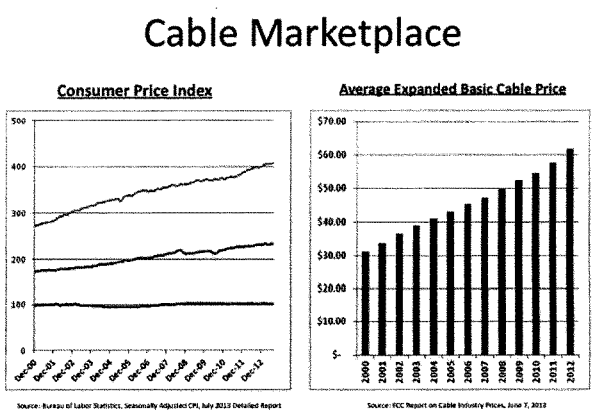
In addition to the direct adverse impact that outdated retransmission consent rules have on the consumers who end up bearing the cost of the broadcasters' demands, they also threaten the consumer benefits of local facilities-based video provider choice such as innovative service and product offerings, differentiated programming, pricing options, and broader deployment of high speed broadband.

The impact on consumers

The recent retransmission consent dispute between Time Warner Cable and CBS has brought into sharp focus the fact that the current retransmission consent regime leaves consumers vulnerable to service disruptions and offers no protection against escalating prices.

And, in fact, it is well established that the cost to MVPDs of obtaining broadcast programming has been and continues to increase exponentially and consumers are feeling the impact through increased prices. SNL Kagan projects retransmission fees paid to broadcasters by video providers could reach a total of $6.1 billion by 2018, up from the $2.4 billion estimated in 2012. During its last round of retransmission negotiations, as mentioned above, CenturyLink experienced this sharp increase in the cost for broadcast content.

In turn, these high content costs have resulted in higher video service prices. For instance, according to the FCC report on Cable Industry Prices released on June 7, 2013, the average monthly price of



expanded basic service[1] for all communities surveyed increased by 4.8% over the 12 months ending January 1, 2012, to $61.63, compared to an annual increase of 2.9% in the Consumer Price Index (CPI). Further, the price of expanded basic service has increased at a compound average annual growth rate of 6.1% over the same period while the CPI compound annual growth rate over the same period was only 2.4%. These increases are simply not sustainable for MVPDs or consumers.

The solution: Modernize the Cable Act to restore a level-negotiating table during retransmission consent negotiations

Congress has an opportunity, as part of the reauthorization of the Satellite Television Extension and Reauthorization Act of 2010, to restore balance to the retransmission consent marketplace.

The significant regulatory advantages that Congress has conferred on the broadcast industry for various reasons, and under various circumstances that no longer exist, are not benefitting consumers. The current model clearly needs to be modified. The issue of negotiations and related timing should be addressed immediately. Under the existing legislative regime, local broadcast stations have the right to pull the plug on any video provider when retransmission negotiations hit a standstill, blacking out all nationally distributed programming (CBS, ABC, NBC, FOX,). Moreover, they are bolstered by a regulatory regime that erects barriers that effectively prevent providers from obtaining that programming from a station in another media market. Congress needs to amend the current legislative framework to restore a more level negotiating table.

[1] The average monthly price of expanded basic service is the combined price of basic service and the most subscribed cable programming service tier excluding taxes, fees and equipment charges.

CenturyLink favors a deregulatory approach under which the 1992 Cable Act would be amended to allow providers the right to carry national programming from an adjacent or alternate market during a broadcast retransmission consent negotiation breakdown. Consumers should not be punished as a result of provider negotiations.

We also support other measures, such as Congressman Scalise's *Next Generation Television Marketplace Act,* and we commend Ranking Member Eshoo for her leadership in circulating a discussion draft of *The Video Choice Act.* Both are essential elements in a process that Congress must begin soon.

Final thoughts

At the end of the day, this is not about winners and losers. It is about consumers and the future of a truly competitive marketplace. At the current rate of change, the real harm is occurring now for consumers who are required to pay for increases in real dollars. At some point, the model breaks. Local broadcasters are effectively using outdated rules to inhibit consumers from receiving the benefits of program choice and a truly viable, competitive marketplace. Congress can play a significant pro-consumer role by modernizing current retransmission statutes and establishing meaningful guidelines for negotiations and access to adjacent content to prevent blackouts.

Thank you for the opportunity to testify today. We look forward to working with members of the Committee to accomplish legislative reform in the evolving video marketplace. We are confident that rapid and meaningful reform will encourage new entrants like CenturyLink to continue to expand our investments in broadband and digital video services and allow us to provide American consumers with the benefits of innovation and competition.

Mr. WALDEN. Mr. Campbell, thank you for your testimony. We will now go to our final witness this afternoon from Public Knowledge, the Senior Staff Attorney, John Bergmayer.

Mr. Bergmayer, thank you for being here and we look forward to your testimony.

STATEMENT OF JOHN BERGMAYER

Mr. BERGMAYER. Good morning, Chairman Walden, Ranking Member Eshoo, and members of the subcommittee. Thank you for the opportunity to participate in today's hearing.

Today, I am going to talk about two things: First, I have a few remarks on current video issues; then, I will present a few ideas that will make the video marketplace more competitive and affordable.

For years, Public Knowledge has met with both sides of the aisle on video reform issues and we frequently find that we agree with several proposals coming from Members of Congress who come from very different political backgrounds. While there are some real differences of opinion on how to proceed, there is a widespread recognition that current rules and the market structure they enable are not serving the viewer as well as they should. We are in a window where reform is possible only if members of this committee come together to find common ground.

The month-long blackout the kept CBS programming, both broadcast and cable, from appearing on the lineups of Time Warner Cable subscribers has focused the attention of some policymakers. Ranking Member Eshoo's draft Video CHOICE bill puts forward a number of creative ideas that could move the video marketplace in a good direction. Under the provisions of this discussion draft, not only would viewers be protected from the effects of corporate contract disputes that blackout channels, they would get more choice on what channels they subscribe to and could see their monthly fees go down.

Another approach, the Television Consumer Freedom Act is being promoted by Senators McCain and Blumenthal. This bill proceeds from the observation that programmers, broadcasters, and cable companies all receive a number of special protections from the government. It asks that they provide viewers with more choice in exchange.

We have also been encouraged by efforts by Representative Scalise in previous Congresses to look for outdated video regulations that merit elimination in order to remove unnecessary protections for video incumbents.

We should not overlook an important part of viewer choice. That is choice in the devices that people can use to access their cable programming. Cable set-top boxes often have high rental fees and lack the innovation found in other areas of consumer electronics. This is why Congress passed Section 629 of the Communications Act. Congress and the FCC should continue to enforce the current cable card implementation of that statute while moving to a more modern implementation that fixes some of the shortcomings.

Congress must reauthorize STELA. Satellite has been a success story where action by Congress and the FCC insured that a new distribution technology could access content and reach viewers. It

should be a lesson for policymakers about the importance of fostering new modes of video competition. The success of STELA points to the best long-term approach for improving the video marketplace. That is to promote competition from new providers.

The internet is changing the video marketplace just as it changed the market for other media. However, dominant players in video have control over the content online competitors need for their service and the pipes they need to reach viewers. New technology will play a large part of video delivery but the market may not reach its full competitive potential. Consumers will still suffer from a lack of choice and independent content producers will struggle to reach viewers.

But there is a solution at hand. Congress should make sure that its pro-competition video policies are technology-neutral. If it does this while protecting internet openness, it can ensure that videos have more choices.

Like satellite, online video is a success story but it can be much more than it is now. It is not driving down cable prices. For most users, it is a supplement to cable, not a replacement. Congress and the FCC can help online video develop into a full competitor in three easy ways: First, they can clear away some of outdated rules that slow down the evolution of the video marketplace; second, they can extend the successful policies that protect providers from anti-competitive conduct to certain online providers; and third, they can protect internet openness and prevent discriminatory billing practices that hold back online video. This will increase competition, meaning lower prices, better services, and more flexibility and control for consumers.

To be sure, many of the regulations that permeate the video marketplace can be repealed today. These rules include the Sports Blackout Rule and prohibitions on distant signal importation. Some other rules like the Compulsory Copyright License are outdated but must be reformed cautiously. Measures that are designed to mitigate the market power of certain large video providers should not be repealed until effective competition develops. Examples of these kinds of roles included the Program Access and Program Carriage Rules.

In some respects, they should be extended. For example, online video providers that wish to voluntarily operate as multichannel video programming distributors should be able to do so. This would ensure that consumers had more choices for high-value content than they do today. It would eliminate the incentives that keep certain content from being licensed widely.

Finally, Congress can help ensure the internet remains open to creators of all sizes by working to prevent the anti-competitive use of data caps and other open internet violations.

My brief oral testimony can only touch on a few issues. My written testimony contains more detailed analysis and recommendations.

Thank you for inviting me to speak and I look forward to your questions.

[The statement of Mr. Bergmayer follows:]

Testimony of John Bergmayer
Senior Staff Attorney
Public Knowledge

Before the
Committee on Energy and Commerce
Subcommittee on Communications and Technology

Hearing On:
"Innovation Versus Regulation in the Video Marketplace"

Washington, DC
September 11, 2013

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September 11, 2013

Good morning Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee. Thank you for the opportunity to participate in today's hearing. My name is John Bergmayer, and I work for Public Knowledge, a non-profit public interest organization that seeks to ensure that the public benefits from a media ecosystem that is open, competitive and affordable. Today, I am going to recommend that the House consider re-aligning some of the rules that govern the video marketplace so that they better serve the public interest, allowing all creators to be fairly compensated while bringing down bills and increasing the choices available to viewers.

RECENT DEVELOPMENTS

The scope of this hearing is broad, and this testimony will touch on many broad themes. But it is appropriate to begin with comments on a few specific video-related issues that have gotten attention on the Hill recently.

Legislation Unbundling the Cable Package

For years, viewers have said they want more flexibility and choice with their cable packages. They want to save money, and have more control over what comes into their homes, without losing access to the programming they love. But the structure of the video market has kept this from happening. Large content companies require that their less-popular programming is bundled with their more well-known offerings. Broadcasters package their must-have signals together with their cable networks—and cable companies are actually forbidden by law from offering broadcast stations à la carte. Finally, cable companies and other MVPDs have historically not faced the kind of competitive pressure that would make them more responsive to changing customer needs. This has given them the ability to raise rates and pass along content fees to customers.

As this testimony will demonstrate, Public Knowledge believes that the long-term solution to the problem of inflexible, expensive video packages is through competition—in particular, through policies aimed at ensuring online video distributors can access the same content as their established rivals, and reach customers with high-quality streams.

However, this approach will take many years to realize, and customers are hurting today. That is why it is exciting that Senators McCain and Blumenthal are promoting a bill that would bring immediate relief to consumers. The fact is, many players in the video marketplace—cable companies, broadcasters, and programmers—receive various government benefits. Over the years, members of Congress and representatives of the industries at this hearing today have proposed different ways of eliminating, modifying, or expanding some of them. The McCain/Blumenthal bill modestly proposes that, to qualify for these legal protections, companies need to offer viewers more choice, and the ability to more carefully tailor their video subscriptions—and not prevent such choice through restrictive contracts. Notably, the bill does not require that all viewers assemble their video subscriptions on a channel-by-channel basis. Bundles will still be available to viewers who want them—in fact, if the bill is passed, it is likely that there will be more bundles than ever before, at different price points, better reflecting the diversity of viewer interests. Thus, the critics of à la carte who view choice and convenient programming packages as in conflict are simply off base. The bill will simply ensure that the only people who pay for expensive programming are the people who actually want to watch it, and it will likely increase the diversity of programming that is available by allowing people to direct their monthly fees to the programming they want to see, instead of to programming they are forced to buy. Until recently, we had not seen such consumer-friendly legislation discussed in the House. But this Monday, Ranking Member Eshoo distributed a discussion draft of her Video CHOICE Act. Ranking Member Eshoo's discussion draft empowers the FCC to protect consumers ability to access content during these disputes, and, like the McCain/Blumenthal Bill provides greater choices for consumers in their pay-TV subscription packages. I encourage other members to work with her to move this draft towards introduction.

The Implications of the Time Warner Cable/CBS Blackout

The month of August was frustrating for customers of Time Warner Cable, the second-largest cable company in the United States. Unable to come to terms with CBS, TWC customers were not able to access popular CBS programming—broadcast content as well as cable channels like Showtime—on their cable subscriptions. While they were able to get some content over the air, CBS went as far as to block TWC *broadband* subscribers, including those that are not even cable customers, from accessing some CBS content online.[1] This month-long cable and Internet blackout was notable for its length, and for the sharp words exchanged between executives of the different companies. But unfortunately, it was not unprecedented. It was just the latest in a series of blackouts that have been increasingly disruptive to viewers. In 2010, during the Fox/Cablevision dispute where cable and Internet viewers were also blacked out, Public

[1] In this context it is worth noting that the most notable incidents where online content companies have blocked specific ISPs appear to be side effects of an increasingly dysfunctional video marketplace. Whether it is blackouts related to retransmission disputes, NBC restricting some its online Olympics coverage to customers of certain ISPs, the corporate red-tape that makes it so that some Apple TV apps only work for customers of certain MVPDs, or even "authentication" initiatives like TV Everywhere, this new kind of threat to Internet openness—which is, to be clear, distinct from "net neutrality"—is something policymakers should pay attention to. The best way to prevent online video from turning into a series of walled gardens tied to traditional cable would be for policymakers to address the root of the problem—an uncompetitive video marketplace that is being distorted by regulations that have not been updated to reflect today's business and technological realities.

Knowledge warned that it was a "sign of things to come."[2] This prediction proved correct. To quote the American Cable Association,

> In 2012, millions of pay TV subscribers went without access to local broadcast signals from their cable or satellite TV provider because of 91 retransmission consent disputes, a 78% increase over blackouts experienced in 2011, and an even greater increase over the number of blackouts in 2010. In 2013, following the CBS-TWC blackout, subscribers of four different pay TV providers in 52 markets will have lost signals of 75 separate TV stations.[3]

Unless policymakers work to repair a retransmission consent system that is boosting broadcaster profits at the expense of viewers, blackouts like August's CBS-TWC blackout are *still* only the beginning.

STELA

Congress must reauthorize the Satellite Television Extension and Localism Act by the end of 2014. This law ensures that satellite television companies can continue to retransmit local broadcast stations to their customers, and it is an important building block of video competition. Even as it considers various video reform proposals, Congress should not put off reauthorizing this important provision to the last minute. Satellite television has been a success story, where action by Congress and the FCC ensured that a new distribution technology could access content and reach viewers. It should be a lesson for policymakers about the importance of fostering new modes of video competition. Certainly, Congress should not put the video competition we have already achieved at risk by failing to ensure that satellite viewers can continue to access popular programming without interruption.

Video Device Competition

Policymakers should reject attempts, whether at the FCC or in Congress, to weaken the CableCARD system or to make it more difficult for the FCC to implement its successor. Congress passed Section 629 of the 1996 Telecommunications Act for good reasons that remain valid today, and the cable industry agreed to adopt CableCARD to implement it. Just as consumers benefit from choice and flexibility in other areas—such as mobile phones—they should benefit from a competitive market in video devices that can access cable content. Too many people are still paying too much money to rent sub-par set-top boxes from their cable companies. This, not CableCARD, is what harms viewers and helps drive up monthly bills. If CableCARD is weakened, this problem will only be exacerbated, as more consumers lose the ability to get better equipment from other providers.

While Public Knowledge continues to believe that a "home video gateway" approach is a better way to implement the goals of Section 629 today and in the future, the current

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[2] Letter from Harold Feld, Public Knowledge, to Julius Genachowksi, Chairman, FCC, Oct. 21, 2010, http://publicknowledge.org/letter-fcc-implications-foxs-internet-blocking.

[3] Letter from Matthew Polka, American Cable Association, to Mignon Clyburn, Chairwoman, FCC, Aug. 22, 2013, http://www.americancable.org/files/130822%20ACA%20TO%20FCC%20--%20No%20More%20TV%20Blackouts.pdf.

CableCARD system benefits many viewers, and enables innovative, well-regarded products like the TiVo Roamio, and interesting upcoming devices like Samsung's Smart Media Player. It should stay in place until a better system is in place, and to the extent members can identify shortcomings with CableCARD, they should encourage the FCC to replace it with something better, rather than selectively removing its ability to make the current system work as well as possible.

SUMMARY OF BROADER RECOMMENDATIONS

There is widespread agreement that we are living in a golden age of television. Technology has increased people's choices so they can watch just the shows and movies they are interested in. Digital technology allows cable and satellite services to fit more channels in the same bandwidth. DVRs give people control over how they watch broadcast and cable programming, and online streaming services provide access to a large back catalog of movies and TV shows. Computers, smartphones, tablets, and connected devices are changing what it means to "watch TV."

These new choices have allowed people to watch more specialized programming that fits their individual tastes. But while some pessimists have predicted that new technology would create a "filter bubble" that isolates people from each other and deprives them of common cultural reference points, this has not happened with video. Programs like House of Cards, Mad Men, Game of Thrones, Dancing with the Stars, NCIS, and (of course) live sports are still part of our cultural landscape. Even in this era of 500 channels, these kinds of programs still inspire discussions around the water cooler and on Twitter.

But despite all of the great programming and groundbreaking devices, many Americans are locked into a television business model that limits competition and choice: the expensive bundle of channels. Most of the most popular programming is not available except through traditional subscription TV services, and these grow more expensive year after year. Two years ago, the monthly fee for cable TV (*not* including broadband) hit $86 per month, and is projected to rise to $200 per month by 2020—that is, unless Congress does something about it.[4] By contrast an online video-on-demand service like Netflix or Amazon Instant Video costs less than $10 per month.

While cable and satellite companies have improved some of their offerings to match the convenience of what is available online, they have a long way to go, and do not come close to matching the value those services offer. This is because most Americans do not have a meaningful choice when it comes to selecting their video provider, so market forces have not been able to keep prices low. Often, if consumers want an affordable broadband and a video subscription that gives them access to must-see content, they can only turn to their local cable company. This is a legacy of a time when subscription video service required a specialized network, and simple economics did not allow for much competition. But this is no longer the case; the technology exists to allow people to have as many choices of video provider as they have of email providers, or of restaurants. While there may be a continuing place for specialized

[4] NDP Group, *Pay-TV bills continue to increase by 6 percent, year-over-year, as consumer-spending power remains flat*, Apr. 10, 2012, https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120410.

technology or networks to deliver live programming, in a largely on-demand world there should be many more video providers than we currently see.

The ongoing dominance of the MVPD model is made possible largely by an outdated regulatory structure created by broadcast, MVPD, and content incumbents to gain competitive advantages and to cement their place in the video ecosystem. Moreover, most people get their broadband through Internet service providers that also are video distributors, and who have the motivation and the means to discriminate against online video services. It is time for Congress and the FCC to revamp the rules of the video industry to promote the public interest. A video marketplace that served the public interest would give viewers more choice of providers and the ability to watch any programming whenever they want on the device of their choosing. At the same time it would ensure that creators and distributors could continue to get paid a fair price. A video marketplace that served the public interest would align the interests of viewers, creators, and distributors, not set one against the other.

The House and other policymakers can achieve this ambitious goal in three ways. First, they can clear away or update some of the outdated rules that slow down the evolution of the video marketplace. For example, protectionist policies like the sports blackout rules should be repealed, and the dysfunctional retransmission consent system should be updated. Second, they can extend the successful policies that protect smaller video competitors. For example, if a large cable system would be prohibited by law from acting anti-competitively toward a satellite provider, there is no reason why it should be able to take the same actions against an online video provider. Third, they can protect Internet openness and prevent discriminatory billing practices that hold back online video. In addition to supporting the FCC's Open Internet rules, House Members and other policymakers should examine whether discriminatory data caps hold back online video competition. By doing this they will increase competition, which will mean lower prices, better services, and more flexibility and control for consumers.

HISTORICAL CONTEXT

For nearly a century the federal government has shaped the development of electronic media. In the 1920s the Federal Radio Commission brought order to the chaotic and experimental landscape that characterized early broadcasting. In doing so it set the conditions that allowed radio and then television broadcasting to develop into what it was in its heyday, and what it is today. In the 1960s and 1970s the FCC took steps to protect broadcasting from the disorganized and innovative early cable industry.[5] By doing this it made sure that cable became an adjunct to rather than a replacement for established broadcasting.[6]

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[5] *See United States v. Southwestern Cable Co.*, 392 US 157 (1968). This case, in addition to being an important case setting out the bounds of FCC authority, contains a summary of the FCC's early efforts at cable regulation. In 1976, the House Subcommittee on Communications issued a staff report titled "Cable Television: Promise Versus Regulatory Performance" that stated that the FCC "has chosen to interpret its mandate from Congress as requiring primary concern for individual broadcasters rather than the needs of the audience being served." 94th Cong., 2d sess., 1976, Subcomm. Print. *See also* Office of Telecommunications Policy, Cable: Report to the President (1974) (OSTP Report), which contains an early history of the cable industry and attempts at cable regulation, as well as policy recommendations.

[6] The OSTP Report said that "cable is not merely an extension or improvement of broadcast television. It has the potential to become an important and entirely new communications medium, open while and available to all." OSTP

After Congress passed the Cable Act of 1984, the tables turned and cable became the monopoly. Cable operators controlled who did and didn't get on the new medium, using their power to require cable programmers, such as the fledgling CNN and Discovery, to provide "pay for play" equity interests to cable operators, or sign exclusive agreements prohibiting programmers like MTV from appearing on potential competitors such as Direct Broadcast Satellite (DBS). At the same time, cable operators received access to needed inputs such as pole attachment rights and broadcast programming. The lack of effective competition led to high prices and poor service, but the cable incumbents' control over "must have" programming made it impossible for any competing services to emerge.

It was not until the 1992 Cable Act[7] that Congress embarked on an express policy of promoting competition in the television market. It realized that potential competitors needed access to the same content as large cable systems with market power. New requirements such as program access rules that gave competitors access to programming owned by the cable operators, and program carriage rules that prevented cable operators from demanding an equity share as a condition of carriage ("pay for play"), helped make it possible for new "multi-channel video programming distributors" (MVPDs) to compete with cable operators, as did changes to the law to make it easier for competitors to get access to broadcast programming. (The remainder of this testimony will use the term "MVPD" to refer to cable, satellite, and telco video services such as U-Verse and FiOS generically.)

These policies of promoting competition were somewhat successful but their promise was not entirely fulfilled.[8] They enabled some new competitors to operate but these new competitors did not change the fundamental shape of the market. They did not slow the increasing power of cable generally and a few large cable companies in particular.[9] And they did little or nothing to keep the market from consolidating in ways detrimental to consumers and independent content producers alike. To an extent, this result was brought about by the technology of the time. However, broadband now gives policymakers the chance to promote true competition in video.

The Internet is beginning to change the video marketplace just as it changed the market for music, news, books, and other forms of media. Consumers have new options and incumbents are responding. But it is not a foregone conclusion that the Internet will fundamentally alter the

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Report at 13. But while cable did succeed in providing viewers with more content it fell short of this early promise, and the regulatory system that developed ensured that cable extended the reach of broadcasting instead of developing into a competitor to it.

[7] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[8] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fourteenth Report*, MB Docket No. 07-269 (rel. Jul. 20, 2012), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-81A1.pdf. *See also* Comments of Public Knowledge in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269 (June 8, 2011), *available at* http://www.publicknowledge.org/files/docs/PK_Comments_MVPD-Competition-Report.pdf.

[9] For example, Adelphia's cable assets were sold to Time Warner Cable and Comcast. *See* Adelphia Sold to Time Warner, Comcast, BUFFALO BUSINESS FIRST (Apr. 21, 2005), http://www.bizjournals.com/buffalo/stories/2005/04/18/daily37.html?page=all. Comcast's cable assets and NBC Universal have been combined in a joint venture that is controlled by, and 51% owned by Comcast. *See* General Electric, New NBCU, http://www.ge.com/newnbcu.

video marketplace. Because they are missing so much of the most popular programming, and because fast broadband is not yet sufficiently deployed, online video providers are more complements to, than replacements for, an MVPD subscription. While Netflix and Amazon have proved fatal to most video rental shops, they do not directly compete with MVPDs, which have shown themselves to be considerably more robust.

This is because cable and media incumbents have control both over the content their nascent online competitors need for their service (either through direct ownership, or through contracts that limit online distribution), and over the pipes they must use to reach consumers. As a result much high-value programming is not available online, and online video providers have to contend with artificially low bandwidth caps and other discriminatory practices that keep them from reaching their full potential.

Thus while it is inevitable that IP technologies and the Internet will play an ever-larger role in video delivery, it remains an open question whether consumers or incumbent MVPDs will benefit most from this technological transition. Consumers will still suffer from a lack of choice and independent content producers will still struggle to reach viewers if existing incumbents in the content and MVPD industries continue to thwart disruptive change and control the transition for their own benefit. Congress should once again take the necessary steps to ensure that incumbents cannot throttle (literally as well as figuratively) the legions of potential competitors trying to reach willing consumers.

MVPDs and content companies are operating in their own self-interest under a framework that Congress and the FCC designed. Congress can address some of the challenges the future development of the video marketplace faces by pruning away the needless overgrowth of older rules, like syndicated exclusivity, the sports blackout rule and the network non-duplication rule, that exist only to protect the business model of local broadcasters and other incumbents. Some other rules, like retransmission consent and the compulsory copyright license, are outdated, but part of an interwoven fabric of regulatory and business expectations. They should be reformed, but cautiously.

At the same time, measures that are designed to mitigate the market power of certain large video providers should not be repealed until effective competition develops. In some respects they should be extended. For example, online video providers that wish to voluntarily operate as MVPDs should be able to do so, as this would enable them to access certain valuable content and protect them against anti-competitive actions by incumbents.[10] This would ensure that consumers had more choices for high-value content than they do today and would eliminate the incentives that keep certain content from being licensed widely.

Finally, the fact that the largest residential broadband Internet service providers (ISPs) are also MVPDs invested in the existing video distribution models raises concerns. These ISP/MVPD combinations can impose a variety of policies that prevent genuinely disruptive competition. For example, the ability to control how much data subscribers may access through

[10] *See* Comments of Public Knowledge in Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Proceeding, MB Docket No. 12-83 (filed May 14, 2012) (Sky Angel Comments), *available at* http://www.publicknowledge.org/interpretation-mvpd.

data caps, the ability to privilege some content over others through prioritization or exemption from data caps, and the ability to control what devices can connect to the network, give cable operators (and other broadband providers like FiOS) the ability to pick winners and losers just as cable operators did from 1984 to 1992.

DETAILED ANALYSIS AND RECOMMENDATIONS

The video marketplace is unique, not only because of its complicated business and regulatory structures, but because some cable incumbents are better placed to counter the challenge the Internet poses to their business models in varied ways. The structure and practices of large media companies, copyright policy, and even spectrum policy can directly affect the video marketplace.

Threats to Internet Openness

For a long time it looked as though ISPs would continue doing what Comcast did when it started degrading BitTorrent traffic—picking and choosing which Internet protocols and services got preferential or discriminatory treatment. But recently ISPs have found that it is more effective to discriminate via billing practices. Some ISPs have set their bandwidth caps so low as to make it financially unattractive to switch over entirely to online video, as this would put viewers over their caps and perhaps subject them to overage charges.[11] At the same time, at least one ISP exempts its own video services that are delivered over the same infrastructure from its caps.[12] To top it off, some ISPs cannot even accurately measure their subscribers' usage.[13] These practices disadvantage services like Netflix and Amazon Instant Video and relegate most online video to the role of a supplement to, rather than replacement for, traditional MVPD services.

To counter this, Congress needs to stand behind the FCC's attempts to protect Internet openness,[14] and it needs to find out more about why wireless and wireline providers set data caps at the levels they do.[15] At the same time these protections need to be strengthened, their loopholes need to be closed, and they need to take into account the fact that discrimination can

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[11] ANDREW ODLYZKO, BILL ST. ARNAUD, ERIK STALLMAN, & MICHAEL WEINBERG, KNOW YOUR LIMITS: CONSIDERING THE ROLE OF DATA CAPS AND USAGE BASED BILLING IN INTERNET ACCESS SERVICE 48 (Public Knowledge 2012) ("Comcast's own estimate for the amount of data required to replace its pay-television offering with an over the top competitor is 288 GB per month. In light of this, it may come as no surprise that Comcast's data cap is set at 250 GB per month."). Comcast has since raised its cap, but it is worth observing that the 288 GB per month figure is based on an unknown mix of standard and high-definition content; presumably, a higher percentage of high-definition video would lead to a higher figure. *See* Mark Israel and Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, Submitted by Comcast Corporation, MB Docket No. 10-56 (May 4, 2010) at 33, *available at* http://apps.fcc.gov/ecfs/document/view?id=7020448237.

[12] Michael Weinberg, *Comcast Exempts Itself From Its Data Cap, Violates (at least the) Spirit of Net Neutrality*, PUBLIC KNOWLEDGE (March 26, 2012), http://www.publicknowledge.org/blog/comcast-exempts-itself-its-data-cap-violates-.

[13] Stacey Higginbotham, *More Bad News About Broadband Caps: Many Meters Are Inaccurate*, GIGAOM (Feb. 7, 2013), http://gigaom.com/2013/02/07/more-bad-news-about-broadband-caps-many-meters-are-inaccurate.

[14] Preserving the Open Internet, *Report & Order*, GN Docket No. 09-191, FCC 10-201, (rel. Dec. 23, 2010), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

[15] For example, Representative Anna G. Eshoo, Ranking Member of the Communications and Technology Subcommittee of the House Energy and Commerce Committee, has recently asked the GAO to investigate data caps. Letter from Representative Anna G. Eshoo to The Honorable Gene L. Dodaro, Comptroller General of the U.S. Government Accountability Office (May 9, 2013).

happen through billing, as well as through Internet "fast lanes" that prioritize one service's traffic over another's, and other forms of technological discrimination.

Restrictions on the Availability of Content and Rising Content Costs

The current regulatory system is based around the relationship of broadcasters and MVPDs,[16] and this system makes it easy for incumbents to share content with each other while keeping it out of the hands of potential new competitors.[17] And while it's unlawful for incumbent providers to behave anti-competitively towards each other, they are free to keep their content away from online services, and to use exclusionary contracts and "most favored nation" clauses to limit the online distribution of independent programming.[18]

As a result, while a lot of very good video programming is available online, the most popular programming is not.[19] Most popular broadcast and cable channels are not available online. Many popular shows are not available online at all or are only made available after a "windowing" period. Some programs are put online reasonably promptly, but are only viewable in inconvenient ways. Some of the best online content is only available to viewers who also have cable subscriptions, through TV Everywhere and similar efforts. Live local sports are generally not available online at all. Thus, while online services make it easy to watch great documentaries, classic movies, and old sitcoms, the kinds of culturally-current programming that people talk about at the office and online are often not available without a cable or satellite subscription.

This problem would be largely abated if online providers like Sky Angel and ivi[20] were permitted to operate as MVPDs, like they want to.[21] The rules that protect MVPDs from anti-competitive conduct would then protect them as well as incumbents. At the same time, the FCC should find that the current rules that prohibit incumbents from behaving anti-competitively toward each other also prohibit them from taking anti-competitive acts against online video

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[16] 47 U.S.C. § 325; 47 C.F.R. § 76.64.

[17] 47 U.S.C. § 548 provides that,

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

These baseline statutory requirements still apply even though the Commission has recently modified its program access rules. *See* Revision of the Commission's Program Access Rules, *Report & Order*, MB Docket 12-86 (rel. Oct. 5, 2012), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-123A1.pdf.

[18] Jon Brodkin, *DOJ Probing Big Cable Over Online Video Competition*, ARS TECHNICA, (June 13, 2012), http://arstechnica.com/tech-policy/2012/06/doj-probing-big-cable-over-online-video-competition (noting that "[t]he DOJ is also investigating contracts programmers sign to be distributed on cable systems, which include 'most-favored nation clauses' that may favor cable companies over online video distributors.")

[19] *See* Carlos Kirjner, Internet TV (or Why It Is So Hard to Go Over the Top), Bernstein Research (June 15, 2012).

[20] *See* Ryan Lawler, *Court Rules Ivi.tv Not a Cable System, Issues Injunction*, GIGAOM (Feb. 22, 2011), http://gigaom.com/2011/02/22/ivitv-injunction.

[21] *See* Public Knowledge Sky Angel Comments.

providers, including those that choose not to operate as MVPDs.[22] But even short of that, if more content were available from online services that might choose to operate as MVPDs, the incentive to keep content offline would evaporate to the benefit of the entire video marketplace.

The current pay TV MVPD model is very lucrative for some creators and distributors because it forces viewers to pay for large bundles of cable channels even if they only want to watch a few.[23] In fact, every cable subscriber has to pay for broadcast channels, even though they are available over the air for free. This is why some studies have shown that current monthly cable bills are approaching $90 per month,[24] and the FCC has shown that cable rates continue to rise at a faster rate than inflation.[25] If these practices were to be lessened, not only would bills shrink, but also more content might become available to new online providers.

But it is important to understand exactly what causes these problems. Input costs—the fees MVPDs pay to content companies—certainly contribute. Rising fees paid by MVPDs to content companies are one of the main drivers of rising cable bills.[26] MVPDs are often forced to pay for, and pass along to their consumers, less-popular channels in exchange for access to the popular ones. Sports fees are a huge portion of viewers' bills. Derek Thompson has calculated that "if you pay $90 a month for cable, you are paying about $76 a year (about 7 percent of the total cost

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[22] As Public Knowledge has argued,

> The [FCC] should use its authority over the video programming distribution market to protect online video distribution generally, by prohibiting MVPDs from behaving anti-competitively in ways that harm any video distributor, whether or not it is an MVPD. Section 628 of the Communications Act provides authority for this. This Section bans any actions "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing ... programming to subscribers or consumers." The close connection between the markets for MVPD and non-MVPD video distribution mean that anti-competitive actions taken against an non-MVPD would likely have a deleterious effect on the ability of a competitive MVPD to offer programming—for example, by increasing its costs, or inhibiting the ability of an MVPD to offer programming on demand or online.

Sky Angel Comments at 24-25 (quoting 47 U.S.C. § 548).

[23] Peter Kafka, *Hate Paying for Cable? Here's Why*, ALLTHINGSD, March 10, 2010, http://allthingsd.com/20100308/hate-paying-for-cable-heres-the-reason-why.

[24] NDP Group, *Pay-TV Bills Continue to Increase by 6 Percent, Year-Over-Year, As Consumer-Spending Power Remains Flat*, Apr. 10, 2012, https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120410.

[25] The FCC measures the expanded basic tier, which is "the combined price of basic service and the most subscribed cable programming service tier excluding taxes, fees and equipment charges." Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, MM Docket No. 92-266, *Report on Cable Industry Prices* ¶ 2 (rel. Aug. 13, 2012), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-1322A1.pdf. This is not the same as the average or median cable bill, measures which reflect what subscribers actually pay. The Commission found that this specialized measure of rates "increased by 5.4 percent over the 12 months ending January 1, 2011, to $57.46, compared to an increase of 1.6 percent in the Consumer Price Index (CPI). The price of expanded basic service increased at a compound average annual growth rate of 6.1 percent during the period 1995-2011. The CPI increased at a compound average annual growth rate of 2.4 percent over the same period." *Id.*

[26] In fact, Cablevision has recently sued Viacom for bundling channels, "a practice that's led to rising cable bills and ballooning channel lineups." Alex Sherman & Edmund Lee, *Cablevision-Viacom Suit Aims to Shake Up $170B Industry*, BLOOMBERG (Feb. 27, 2013), http://www.bloomberg.com/news/2013-02-27/cablevision-viacom-suit-aims-to-shake-up-170b-industry.html.

of cable TV) just for the NFL."[27] A typical MVPD subscriber might pay about $60 per year just for ESPN, whether or not she watches it.[28]

Retransmission fees for broadcast networks keep rising—NBC expects to collect $200 million in such fees this year, an increase of about 400% from 2012.[29] What's more, retransmission agreements often require that MVPDs carry certain cable networks, limiting the ability of MVPDs to offer more flexible price plans. Content companies are able to do this because of media consolidation. The most popular programming is controlled by a handful of companies like Viacom and Disney. When they make offers, they are hard to refuse. Even the broadcast industry is consolidating as companies like Sinclair scoop up local broadcaster after local broadcaster, contributing to the ongoing problem of different local broadcasters coordinating their retransmission consent negotiations and driving up rates.[30]

But content companies have grown accustomed to these practices for a good reason: in a concentrated market for video distribution, it is easier to pass along increased input costs.[31] MVPDs have never liked having to pay more for content, but it has historically been the cost of doing business. They have traditionally resisted calls to move to an à la carte model. But bills have reached a point where a notable number of viewers (especially younger and more tech-savvy ones) are "cutting the cord" (or never getting a cord to begin with) and doing without

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[27] Derek Thompson, *Mad About the Cost of TV? Blame Sports*, THE ATLANTIC (Apr. 2, 2013), http://www.theatlantic.com/business/archive/2013/04/mad-about-the-cost-of-tv-blame-sports/274575.

[28] *See* Daniel Frankel, *By the Numbers: The Spiraling Cost of Sports Programming*, PAIDCONTENT (Apr. 8, 2012), http://paidcontent.org/2012/04/06/by-the-numbers-the-spiraling-cost-of-sports-programming.

[29] Steve Donohue, *Comcast CFO: NBC Will Collect $200 Million in Retrans Fees in 2013*, FIERCECABLE (Feb. 26, 2013), http://www.fiercecable.com/story/comcast-cfo-nbc-will-collect-200-million-retransmission-consent-fees-2013/2013-02-26.

[30] Among other things, so-called "Joint Services Agreements" allow different broadcasters to collude on retransmission negotiations. As Public Knowledge argued earlier this year,

> Media pluralism does not only ensure that citizens have access to a diversity of viewpoints and sources of information; it creates a baseline level of competition between media companies that helps keep markets competitive and prices low for consumers. Because of the joint negotiations between ostensible competitors, television stations are better able to create a "united front" in demanding higher fees, which are ultimately passed along to consumers. If competing companies worked together on other aspects of their business—for example, in colluding to raise advertising rates—most observers would identify a plain violation of antitrust laws. But under current policies stations feel free to collaborate on this other important aspect of their business operations. This harms consumers and contributes to ever-rising subscription TV bills.

Letter from John Bergmayer to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, in *Promoting Diversification of Ownership in the Broadcasting*, MB Docket No. 07-294; *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; and *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed Jan. 22, 2013).

[31] It is important to note that not all MVPDs have equal bargaining power with respect to content suppliers. A very large cable company with its own content interests like Comcast is in a different position than DISH, Cablevision, or a rural cable system. These smaller MVPDs may not be able to pass along increased prices to their customers, or internalize them through acquisitions. Also, larger MVPDs may be able to negotiate around certain non-price restrictions, such as limitations on the functionality of cable-supplied set-top boxes and other equipment, or the ability to make programming available on tablets or smartphones within the home. By contrast, smaller cable systems may not be able to overcome these kinds of restrictions.

MVPD subscriptions. Cable executives like Time Warner Cable CEO Glenn Britt have started talking about offering consumers more flexible packages and greater control over the bundles they subscribe to.[32] This would be a positive development for consumers. It is an open question, however, whether a market that remains concentrated both on the content and distribution side can evolve to a lower cost model on its own.

One quick way to fix this would be to scrap the rules that require that cable systems carry broadcast stations as part of their basic tier ("basic tier buy-through")—customers should be able to choose what they pay for. Policymakers should also look very closely at the practice some media companies have of bundling their programming together and requiring that cable operators buy it all and put even less-popular channels on lower programming tiers. Bundles can make economic sense for buyers and sellers but they can be abused when there are imbalances in bargaining power or a lack of competitive alternatives. If MVPDs themselves had more flexibility in the programming they purchase, they might become more willing to offer that flexibility to viewers. At the same time, MVPDs should be encouraged to offer more flexible programming packages. Consumers do not object to "bundles" *per se*—popular online services like Spotify and Amazon Instant Video work on a bundled approach that is quickly surpassing the pay-per-download iTunes model. What they object to is expensive bundles that feel like a rip-off. They simply want to get good value for their monthly bill. For some consumers who only watch a few programs, this might mean channel-by-channel à la carte subscription, perhaps coupled with over-the-air TV and online services. For others, it might just mean better bundles—for example, a cheaper sports-free programming package, or a kid-friendly package.

One solution to the problem of rising input costs that would *not* be good for consumers is further consolidation, allowing distributers to internalize content costs and profits. The merger between Comcast and NBC Universal brought a large amount of programming under the control of a cable system that has an incentive to limit its distribution online. While it is true that both the Department of Justice and the FCC conditioned their transaction on Comcast's commitment to make certain programming available to online distributors and to deal with independent programmers fairly,[33] such time-limited behavioral remedies are insufficient to overcome all the anti-competitive effects of mergers, joint ventures, and other structural changes that create incentives to limit distribution and innovation.[34] Furthermore, without an agency that is willing to hold companies to the letter and spirit of their merger conditions, they can simply be ignored, requiring that affected parties undertake expensive legal proceedings to enforce them. Just this has happened with the Comcast merger, where Bloomberg has maintained since 2011 that

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[32] Cecilia Kang, *Time Warner Cable CEO Wants to Slim Cable Bundles, Eyes Aereo's Technology*, WASH. POST (May 2, 2013), http://www.washingtonpost.com/business/technology/want-to-cut-the-cable-cord-time-warner-cable-may-help-you/2013/05/02/f6b43b84-b27b-11e2-baf7-5bc2a9dc6f44_story.html.

[33] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion & Order, 26 FCC Rcd. 4238 (2011); Final Judgment in United States v. Comcast, United States District Court for the District of Columbia, Case No. 1:II-cv-00106 (Sept. 1, 2011).

[34] Petition to Deny of Public Knowledge and Future of Music Coalition in WT Docket No. 11-65 (filed May 31, 2011), at 62-70, available at http://www.publicknowledge.org/files/docs/pk_fmc-att_tmo-petition_to_deny.pdf.

Comcast has not met its "neighborhooding" requirements, and Internet video provider Project Concord had alleged that Comcast was not meeting its online video requirements.[35]

Similarly, horizontal collaboration between different video distributors (such as the "TV Everywhere" authentication system) may seem to provide new options to some viewers in the short term, but only at the long-term cost of preventing the marketplace from evolving to a more competitive state. Likewise, arrangements between large content companies like ESPN where some content gets preferential treatment, such as an exemption from data caps, would not benefit either consumers or creators.[36] Large and small creators might find that they have to negotiate with many different ISPs just to reach viewers, and viewers might only have access to the programming of companies that have paid up. Smaller competitors might not be able to reach viewers at all. This would be counterproductive, anti-competitive, and a violation of Open Internet principles.

Outdated Rules That Protect Incumbent Business Models

Finally, there are some rules on the books today that seem designed to prop up legacy business models and have long outlived any functions they may once have served. Many of them can and should be repealed today. Examples of these include sports blackout rules, network non-duplication, and syndicated exclusivity provisions,[37] and the previously mentioned basic tier buy-through rule that requires that all cable subscribers pay for free over-the-air television.[38] Some of these rules were passed to protect aspects of the video distribution system from disruption before Internet video was a possibility, and when it seemed that if local broadcasters lost revenue nothing could replace them. Exclusivity rules not only keep cable systems from carrying signals from "distant" markets but they prevent networks from distributing content on a non-exclusive basis. The world these rules were written for is gone now and they have outlived their purpose. Some local broadcasters never provided unique local programming, and the various public goals that they provide can be achieved more effectively through other means. Traditional models of video distribution are still valuable, and local broadcasters who serve their communities will continue to thrive after any regulatory reform. Viewers will still have access to local news, weather, and locally relevant programming because they demand it. Reforms should reward local broadcasters and other media outlets for creating their own content rather than for distributing national programming. Simply put, the broadcasting industry no longer needs extraordinary protection against changes in technology, business models, and viewer behavior.

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[35] *See* Letter from Senator Al Franken to FCC Chairman Genachowski, FCC Commissioners, and Assistant Attorney General Varney, Aug. 4, 2011, http://www.franken.senate.gov/files/letter/110804_Letter_to_DOJ_and_FCC_Comcast_conditions_and_Bloomberg.pdf. While there has been some activity on this matter at the FCC the dispute is ongoing. *See* John Eggerton, *Parties Continue to Tussle over News Neighborhooding Condition in NBCU Deal*, MULTICHANNEL NEWS (Oct. 1, 2012), http://www.multichannel.com/distribution/bloomberg-comcast-trade-fcc-filings/139564.

[36] Anton Troianovski, *ESPN Eyes Subsidizing Wireless-Data Plans*, WALL ST. J. (May 9, 2013), http://online.wsj.com/article/SB10001424127887324059704578473400083982568.html.

[37] 47 C.F.R. §§ 76.92(f), 76.106(a), 76.111, 76.120, and 76.127-130.

[38] 47 U.S.C. § 543(7); 47 C.F.R. § 76.901(a) ("The basic service tier shall, at a minimum, include all signals of domestic television broadcast stations provided to any subscriber"); 47 C.F.R. § 76.920 ("Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming.").

Some other rules are outdated, but so interconnected with other rules and marketplace expectations that they need to be approached carefully. Among these are the compulsory copyright license,[39] retransmission consent,[40] and must-carry.[41] The compulsory license cannot be reformed unless video providers are given assurance that they never have to stop carrying programming just because they do not know who to call for a license, and to make sure that they can cope with any potential holdout problems. It would make no sense to embark on a comprehensive reform of the laws governing video carriage in a way that replicated the problems that afflict the retransmission consent process today, while introducing new ones.

Short of dealing with the compulsory license and retransmission consent together, several reforms could improve the current retransmission consent process. Many of the rules that have already been mentioned give an unfair advantage to broadcasters and drive up the rates they can charge. Some broadcasters have engaged in brinksmanship tactics that harm viewers, where they pull their signals from MVPDs right before high-profile events.[42] These problems can at least be alleviated with meaningful "good faith" standards that discourage unfair negotiation tactics, and interim carriage requirements that minimize disruption to viewers.[43] Finally, while the must-carry system is used by many low-value broadcasters in ways that Congress never intended, public and non-commercial stations continue to serve a valuable role and policymakers should find ways to protect the good that they do.

Still other rules serve a function and should be maintained, at least until effective competition develops. These include the program access, program carriage rules, as well as rules that promote choice in set-top boxes and other video devices. The program access rules prevent MVPDs from taking certain anti-competitive actions toward each other. Although the video market is not as competitive as it can be in the Internet age, the fact remains that the American video distribution market is more competitive than that of many other countries.[44] The program access rules have contributed to that, and they should be extended to all services that wish to operate as MVPDs, even ones that are exclusively online. Similarly, the program carriage system, which protects independent programmers from the negative effects of bottleneck control by some MVPDs, still serves a role in ensuring that viewers can enjoy content from diverse sources. Finally, the FCC has not done enough to fulfill Congress's directive to promote set-top box competition—in fact, the FCC's Media Bureau has recently imperiled[45] the Commission's CableCARD program which, though far from perfect, at least gives some cable subscribers more options when it comes to video devices. Until Internet-delivered video becomes a true

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[39] 17 U.S.C. §§ 111, 119, 122.
[40] 47 U.S.C. § 325; 47 C.F.R. § 76.64.
[41] 47 U.S.C. § 534; 47 C.F.R. § 76.55.
[42] Some of these incidents were cataloged in Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 FCC Rcd. 2718, ¶15 (2011).
[43] *See* Comments of Public Knowledge and New America Foundation in MB Docket No. 10-71 (filed May 27, 2011), *available at* http://www.publicknowledge.org/files/docs/11-05-27PK-NAF_retrans_comments.pdf.
[44] For example, "Free-to-air television in Mexico is a stale duopoly in which 70% of viewers tune in to channels broadcast by Televisa, the biggest media company in the Spanish-speaking world. Televisa dominates pay-TV as well, with about 45% of Mexico's cable market and 60% of the satellite market." *Let Mexico's Moguls Battle*, THE ECONOMIST (Feb. 4th, 2012), http://www.economist.com/node/21546028.
[45] Charter Communications had asked for a waiver of some of the Commission's rules, but the Bureau went far beyond what Charter asked for and decided, based on a misapplication of the recent *EchoStar Satellite L.L.C. v. FCC* decision, 704 F.3d 992 (D.C. Cir. 2013), to effectively eliminate most CableCARD requirements.

substitution, preserving the FCC's authority to promote set-top box choice will remain necessary.[46]

Copyright and Spectrum Policy

There are two other kinds of regulations that can hold back the development of online video. Policymakers who are steeped in media issues do not always see them as "regulations" in the same sense as things like syndicated exclusivity. But copyright and spectrum laws are regulations nonetheless, and they have profound effects on the shape of the market.

Copyright law should not be misused to hold back the evolution of the video marketplace. Broadcasters are suing DISH for making a DVR that is too sophisticated and easy to use. But it is not illegal to skip commercials or for users to take full advantage of their home recording rights.[47] And as the Second Circuit Court of Appeals recently found, Aereo's remote antenna is legal just as Cablevision's remote DVR is.[48] Copyrights are limited monopolies granted by the government, and they come with a series of limitations and exceptions designed to protect users as well as creators. They should not be a weapon used to limit experimentation with business models and services.

Nor should misplaced fears of piracy keep content offline. Some content industry executives have a view of technology and the Internet that can only be described as superstitious, and they think that if they give people access to content they will lose control of it. But recent history shows that many people only turn to piracy when content is not available online though other means. Indeed, Netflix has recently provided data that show that as its online service is adopted, unlawful file-sharing decreases.[49] From the perspective of reducing copyright infringement, limiting online distribution is simply counterproductive. Creators will benefit most from an open marketplace that allows different services and voices to reach viewer's homes.[50]

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[46] For example, by implementing AllVid or a similar technology-neutral solution. *See* AllVid, http://www.publicknowledge.org/issues/allvid.

[47] See *Fox Broadcasting v. Dish*, 2012 U.S. Dist. LEXIS 169112 (C.D. Cal. 2012).

[48] *WNET et al. v. Aereo*, No. 12-2786-cv (2d Cir. Apr. 1, 2013), *available at* http://www.publicknowledge.org/files/aereo_decision_2d_circuit.pdf

[49] *See Netflix's Ted Sarandos Talks Arrested Development, 4K and Reviving Old Shows*, STUFF, May 1, 2013, http://www.stuff.tv/news/apps-and-games/news-nugget/netflixs-ted-sarandos-talks-arrested-development-4k-and-reviving-old (quoting the Netflix Chief Content Officer as saying "when we launch in a territory the BitTorrent traffic drops as the Netflix traffic grows."). It is true, as BitTorrent, Inc. states, that BitTorrent has many lawful uses and that BitTorrent, Inc. is not associated with copyright infringement. *See* BitTorrent Blog, *Reports Of Our Death Have Been Greatly Exaggerated* (May 6, 2013), http://blog.bittorrent.com/2013/05/06/reports-of-our-death-have-been-greatly-exaggerated. However, Sarandos appears to have been referring to all files that are exchanged using the BitTorrent protocol (which BitTorrent, Inc. does not control), not just the minority of those associated with BitTorrent, Inc. While BitTorrent is a general-purpose tool with lawful and unlawful uses, it is also true that many viewers use BitTorrent to unlawfully access content that is not otherwise available online.

[50] For this reason, trade and other agreements negotiated on behalf of the United States should not include provisions that could expand the scope of copyrights or copyright enforcement (as many trade agreements do, even though copyright law is already handled internationally by a series of treaties), create new kinds of intellectual property rights (as the proposed WIPO Broadcast Treaty would), or attempt to limit the online distribution of broadcast content. *See* John Bergmayer, *The US-Colombia Free Trade Agreement: Policy Laundering in Action*, PUBLIC KNOWLEDGE (Apr. 20, 2012), http://www.publicknowledge.org/blog/us-colombia-laundering (arguing that language in some free trade agreements could be read as limiting online video distribution). *But see* Comments of ABC, CBS,

A service like Aereo's raises issues of spectrum policy as well as copyright. Broadcasters are given free use of the public's airwaves in exchange for certain public obligations, such as the obligation to provide free programming to the public. While it is true that Aereo does not pay retransmission fees like MVPDs do, it is also true that Aereo, unlike MVPDs, *only* provides people with access to the free local signals they are already entitled to view. As Congress found in 1976,

> The Committee determined ... that there was no evidence that the retransmission of 'local' broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming that is broadcast in 'distant' markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.[51]

The majority of viewers do not watch over-the-air broadcasters directly, but only as those stations are carried by MVPDs. This leads some to question whether the allocation of spectrum to broadcasting makes sense at all.[52] Certainly, the broadcasters who have said they may no longer want to continue broadcasting should feel free to return their spectrum to the public so that it can be put to other uses.[53] However, broadcast content is still important to many viewers and, driven to cut the cord because of rising MVPD subscription costs, a new generation of viewers is becoming more familiar with rabbit ears and over-the-air viewing.[54] Aereo and services like it should be part of this. If Aereo ultimately wins the court challenges against it and Congress decides to revisit the law, it should consider creating a path where online video services can choose to operate as online MVPDs, which would increase the opportunity for content creators to get paid for their work and to reach new viewers. However, making an antenna rental service illegal would not benefit the public, would provide no benefit to creators, and would be contrary to the public purpose of broadcasting.

CONCLUSION

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and NBC Television Affiliates in MB Docket No. 12-83 (filed June 13, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021922660 (arguing that it would be consistent with such agreements if online systems were categorized as MVPDs and subsequently followed standard retransmission consent procedures).

[51] Copyright Law Revision, House Report No. 94–1476 (1976).

[52] For example, Economist Thomas Hazlett has observed that "[t]oday, the social opportunity cost of using the TV Band for television broadcasting – 294 MHz of spectrum with excellent propagation characteristics for mobile voice and data networks, including 4G technologies – is conservatively estimated to exceed $1 trillion (in present value)." Comment of Thomas Hazlett, in A National Broadband Plan for Our Future, GN Dckt. No. 09-51, Federal Communications Commission (filed Dec. 18. 2009), available at http://mason.gmu.edu/~thazlett/pubs/NBP_PublicNotice26_DTVBand.pdf.

[53] *See* John Bergmayer, *As Broadcasters "Threaten" to Shut Down, They're Not Getting the Reaction They Were Looking For*, PUBLIC KNOWLEDGE (Apr. 10, 2013), http://publicknowledge.org/not-the-reaction.

[54] Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by the Web*, WALL STREET JOURNAL (Feb. 21, 2012), http://online.wsj.com/article/SB10001424052970204059804577229451364593094.html ("It's cool to have rabbit ears again.").

As they have in the past, policymakers are starting to consider the implications of increasing change in the market for video distribution. History provides examples both of protectionist regulations that should be avoided today, and of pro-competitive measures that enable new entrants to reach viewers. But today is different in one way: Finally, the technology exists that could eliminate the physical, bottleneck control of video distribution that has existed in various forms for decades.

If policymakers take some simple steps to facilitate the development of competitive online video now, later they can begin to disengage from regulations that were designed to counter the effects of this bottleneck control. However, if they fail to do this, it is likely that incumbents will be able to continue to shape the development of the video market and extend their current dominance indefinitely. While the Internet provides grounds for hoping that the future of video will be better for consumers, policymakers have a lot of work to do to help make that happen.

Mr. WALDEN. Mr. Bergmayer, thank you for your testimony.

I want to thank all the witnesses for your testimony. We will now move into the questions.

And I want to pick up on some things you said, Mr. Bergmayer. And I have had some people say in the course of this dispute between CBS and Time Warner Cable when you talk in terms of the customers, do the customers deserve a refund in any portion from your perspective if they didn't get the programming that originally was there and all that?

Mr. BERGMAYER. Yes, sure.

Mr. WALDEN. What's your view on that?

Mr. BERGMAYER. I think it goes without saying that consumers should receive compensation if they don't receive the services that they pay for. And the details of what caused the dispute, that is not any of their concern or business.

Mr. WALDEN. Right.

Mr. BERGMAYER. However, I don't think that will actually solve any of the underlying issues that lead to the blackouts to begin with.

Mr. WALDEN. I understand that. Yes, but it is just something people have talked about, you know, because this one went so long.

Mr. BERGMAYER. Yes, there is dispute.

Mr. WALDEN. And let me ask about because we are all having this discussion about these rules and you heard my opening statement. I am qualified for Social Security so I mean, you know, old enough to get a drink legally. And so I want to talk about the ownership caps a bit because it strikes me and I would be curious to get your comments or any of you because broadcasters clearly have an ownership cap limitation of, what, 39 percent or something or TV does, overall audience. Satellite, you don't have any limitation on markets you serve if I understand it, the two satellite providers. Are ownership caps something that have outlived their usefulness? Cable doesn't really have that, right, so what are your views on that?

Mr. BERGMAYER. Public Knowledge definitely thinks that the media ownership rules serve an important purpose in ensuring that people have a diversity—

Mr. WALDEN. So broadcasters should have an ownership cap but the others shouldn't?

Mr. BERGMAYER. I think, you know, the rules might need to be revisited to be more technology-neutral absolutely. When you are singling out a particular industry, that might be problematic. But in general, media ownership serves a purpose.

And I have to point out that the issue that affects retransmission consent in particular are ownership problems that don't really trigger the rules because they are about stations that are in different markets that still jointly negotiate retransmission consent with large MVPDs. And I am sure some of the cable companies can address that issue better than I can.

Mr. WALDEN. They are not necessarily negotiating at all times with mom-and-pop cable operators anymore either, are they?

Mr. BERGMAYER. There are many small cable operators throughout the country——

Mr. WALDEN. Yes——

Mr. BERGMAYER [continuing]. And rural areas that have retransmission consent—

Mr. WALDEN. We have sort of gotten to the point where we have got big organizations on both sides in many cases, right?

Mr. BERGMAYER. Well, there are big organizations on both sides, and unfortunately, sometimes there are still little guys on both sides——

Mr. WALDEN. I don't dispute that.

Mr. BERGMAYER [continuing]. That get forgotten in this.

Mr. WALDEN. Yes. So, Mr. Campbell, Mr. Dodge, and Mr. Rozzelle, from what I understand, the MVPDs generally object to the bundling of broadcast channels with cable networks during retransmission consent negotiations. And at the same time, each MVPD before us no doubt offers bundled packages of channels to their customers. They also likely offer bundled video and voice and data service or want to offer data. Everybody is kind of getting into that. What is the difference from your perspective between the bundles offered by the programmers and the bundles that the MVPDs themselves offer?

Mr. Dodge, you look like you want to leadoff. Have at it.

Mr. DODGE. Sure. Well, you know, DISH, I think, it has been very, very innovative in the bundles it offers——

Mr. WALDEN. Um-hum.

Mr. DODGE [continuing]. In the market creating family-friendly-only packages that are smaller and more affordable for families, and actually, the bundles offered by the programmers and the bundles offered by the distributors largely are the same thing. We wish we had more flexibility in how we could actually package, but as the bundles are offered to us, they also include restrictions on how we can actually create packages.

Mr. WALDEN. All right. Mr. Campbell?

Mr. CAMPBELL. One of the differences in the bundles we offer to our subscribers if they don't like them or want to go somewhere else, they can call a competitor. In these retransmission negotiations, the bundles are forced on us and if we agree to the terms and conditions, we carry the programming. If not, then we have nowhere else to get it.

So, yes, to echo Mr. Dodge, we are very creative with our bundling package as well in trying to make it as competitive as possible. I think the real issue on the retrans side is the one-sided negotiations of it.

Mr. WALDEN. All right. Mr. Rozzelle?

Mr. ROZZELLE. The packages that we offer our customers are structured as flexibly as we can given the program contracts that we have with the distributors, including the broadcasters under RTC. And that restricts us from doing a lot of things that we would do were we left on our own in terms of offering flexible packages. We are very mindful of the impact of video cost on the affordability of video services. In many of our small markets it is a big issue, and we wish we had more flexibility, Mr. Chairman.

Mr. WALDEN. All right. Mr. Munson, did you want to comment on that?

Mr. MUNSON. I do not work for a company that owns multiple——

Mr. WALDEN. Um-hum.

Mr. MUNSON [continuing]. Cable networks, but if you look at it holistically, there are over 1,200 television stations in America. The networks themselves, let's say ABC, Disney I think actually owns only 8 of those 1,200. So the effective bundling of cable channels with broadcast stations is really a small part of the regular negotiation.

Mr. WALDEN. All right. My time is expired.

I turn now to the gentlelady from California, Ms. Eshoo, for 5 minutes.

Ms. ESHOO. Thank you, Mr. Chairman. And thank you to each one of the witnesses. I think you all gave really very fine testimony obviously, with, you know, your own best wishes of what you think is excellent for everyone. But that is the way it is.

Let me start with Mr. Dodge. Although DISH wasn't part of last month's dispute between Time Warner Cable and CBS, I understand many of your customers were still impacted. Why were they impacted?

Mr. DODGE. That is true because CBS ultimately blocked anyone who had Time Warner broadband service from receiving their online content regardless of whether they actually received a video from——

Ms. ESHOO. So internet service was blocked as well?

Mr. DODGE. Correct. Regardless of whether you were——

Ms. ESHOO. Well, I think that is something for all of my colleagues to keep under their hat as we consider this. I mean, you know, it is metastasizing. I mean this isn't just one area where people are affected. There is a multiplicity of impacts. Thank you for that.

I would like to go to Mr. Munson. In Mr. Campbell's testimony he points out that the FCC rules prohibit cable providers from taking down broadcast signals during a Nielsen ratings sweeps week. My discussion draft includes a similar provision during a retransmission consent negotiation impasse. Why is it unlawful for a pay-TV provider to pull your signal during sweeps weeks but it is OK for a broadcaster to pull their signal during a retrans dispute often time to occur actually on the eve of a big sporting event?

Mr. MUNSON. First of all, I'll maybe answer the last question first. And again, I wasn't involved in the CBS/Time Warner dispute but——

Ms. ESHOO. No, but you are here representing the broadcasters, so that is why I am asking the broad question, excuse the expression.

Mr. MUNSON. As I understand, that retransmission consent contract ended sometime in June or July. There were extensions to it and the dispute ended up with CBS coming off the cable system in August. And really the month of August we are kind of in the doldrums of summer and we are in reruns.

Ms. ESHOO. So you don't find any disparity even on the face of this? You don't see anything that is wrong with it?

Mr. MUNSON. Well, there is always——

Ms. ESHOO. Are you defending it?

Mr. MUNSON [continuing]. Marquee events that are going on——

Ms. ESHOO. But I mean are you defending it?

Mr. MUNSON. I am not sure I understand the question.

Ms. ESHOO. Well, you know, the whole issue. I already gave you my question and, you know, maybe it is difficult for you to answer it and I understand why. Maybe that is the real answer. So thank you.

I would like to go to Mr. Bergmayer. Thank you for what you said about the discussion draft. We appreciate it and we want to work with everyone. We have to have a very good, sensible, bipartisan approach on this thing. So we appreciate what you said in your testimony.

Now, you stated that policymakers should reject attempts whether at the SEC or in Congress to weaken the cable card system or to make it more difficult for the FCC to implement its successor. Can you explain why ending the integration ban before adopting a successor technology would disrupt innovation and harm consumer choice in the set-top box marketplace? Now, this is an issue that I go way back on, way back on, and I can't believe that that many years have gone by since we did the legislation on it, but I obviously have a keen interest in what that policy produced. So can you address it?

Mr. BERGMAYER. Yes, absolutely. I mean people are relying on cable card today and new devices from companies like Samsung and TiVo.

Ms. ESHOO. Maybe just use one sentence to describe to set it up for the Members. What does today's set-top box do and then go to answering the question?

Mr. BERGMAYER. Yes, I mean the set-top box is what allows people to access their cable content. It might be the DVR. It might have some other functions. And most people still are renting their boxes from their cable company. You know, you don't go into the store and buy a device like you do in a lot of other markets.

Ms. ESHOO. Um-hum.

Mr. BERGMAYER. And the Section 629 of the Communications Act was intended to address that and make it a more competitive market that is much more similar to other markets. And cable card, years ago, was the technology that the FCC and the cable industry and a lot of stakeholders came up with to implement 629. And it is still being used today. And as I was saying, you know, there are new devices coming onto the market that are using cable card not just from TiVo, which everyone knows, but also from Samsung entering the cable card market.

Ms. ESHOO. Um-hum.

Mr. BERGMAYER. So it remains an important platform for innovation.

And the integration ban issue, I mean the integration ban tries to assure that these third parties get the same level of support as operator-supplied devices so that the first party operator-supplied box can't do something that a TiVo or Samsung can't also do.

Cable card isn't perfect and for years Public Knowledge has been calling for the FCC to implement a more technology-neutral, a better solution that we think solves a lot of the problems that I think Members have identified with the cable card system. But if the system is weakened now without a successor technology in place, I think that essentially spells the death knell for Section 629. It will

still be on the books but the FCC won't be able to implement it and it becomes less likely that it will ever move forward. And the biggest problem with set-top box is still the high cost of people renting them every month.

Ms. ESHOO. Right. Thank you very much.

Thank you, Mr. Chairman.

Mr. WALDEN. Thank you.

The chair now recognizes the gentlelady from Tennessee, Mrs. Blackburn.

Mrs. BLACKBURN. And thank you, sir.

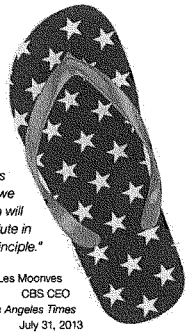
Mr. Munson, I would like to begin with you. At our last hearing on video reform that was in June and I asked a question of Marci Burdick, who was here on behalf of the NAB. And I asked her whether she thought the position the broadcasters took on the radio side where they refused to recognize a performance right for sound recording undermines their position for retransmission. And we got kind of a convoluted response on that one. I imagine you may have heard about that in preparation for the hearing today, and it was something about there has been a symbiotic relationship between radio and artist but nothing really clear.

And the reason I bring it up again is because I am sure that you saw this ad in yesterday's Politico, and it quotes a broadcast executive who said, "the idea that we have to pay them to put up their music on our radio stations is absurd." So, Mr. Chairman, I would like to enter that into the record.

Mr. WALDEN. Without objection.

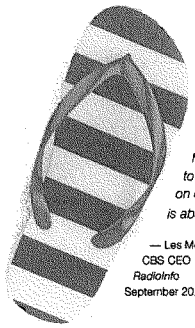
[The information follows:]

americantelevisionalliance.org



"Receiving fair value for our content is core to who we are and we will remain resolute in this principle."

— Les Moonves
CBS CEO
Los Angeles Times
July 31, 2013



"The idea that we have to pay them to put their music on our radio stations is absurd."

— Les Moonves
CBS CEO
RadioInfo
September 20, 2012

Summer's over, but broadcasters haven't put away their flip-flops.

Broadcasters continue to oppose efforts to modernize America's TV rules. They prefer them exactly as they were written back in 1992. That way, broadcasters can keep pocketing ever higher retransmission consent fees, or as they like to call it, "fair value."

But when the shoe is on the other foot, and someone proposes that broadcasters pay fees to carry content, suddenly "fair value" becomes "fair use."

It's time Congress and the FCC make our retransmission consent rules fair to all, especially TV viewers. See more broadcaster flip-flops at AmericanTelevisionAlliance.org.

AMERICAN TELEVISION ALLIANCE
A VOICE FOR THE TV VIEWER

Mrs. BLACKBURN. Thank you, sir. And so I am coming to you now, and my question for you, sir, is can you square that up for us and explain why the broadcast industry supports compensating content owners in the TV market but not in the radio market?

Mr. MUNSON. Thank you, Congressman. If you take a look at it, in essence there are two different business propositions. On the radio side—well, let's start with the TV side. On the TV side we are creating content that multichannel video providers want to buy and then resell to the consumer. So we enter into negotiation, and by the way, they mark that up so that they can make a profit on it. Then we enter into negotiation whereby they buy the programming and then resell it. At the same time, at all times, we are over the air free and we provide that service for no fee if you want to put an antenna up and watch it.

On the radio side that is a direct relationship between the radio station who plays the music of the artist, the artist then increases their—

Mrs. BLACKBURN. Sir, it is all still content. Your answer doesn't square up so you might want to go back and listen to that.

Mr. Dodge, have you got any thought on that?

Mr. DODGE. I don't see any difference.

Mrs. BLACKBURN. Thank you. Anybody else want to weigh in on that?

Mr. BERGMAYER. Public Knowledge has supported that radio broadcasters should pay performance royalties, yes.

Mrs. BLACKBURN. Yes. OK. Thank you.

Mr. Campbell, I would like to come to you for just a second. I am always amazed and I think you are probably hearing this a lot, people talk about retransmission taking place in a free market. And I look at some of what goes on and I am thinking, you know, you look at the mandates, retransmission consent, compulsory copyright, basic tier placement, required tier buy-through, et cetera, et cetera. The list goes on. And those are not necessarily what we would call free market terms. So if you can, just give me kind of a thumbnail sketch when you look at this and we want these negotiations to take place in a free market. That may not be the case, and if not, what rules do you suggest that Congress examine so that we come to a level playing field? You know, in your perfect world what would we be looking at?

Mr. CAMPBELL. Representative Blackburn, thank you. You are correct. I think in any free market negotiation both sides come to the table with some risk and some benefit. And speaking as a new entrant, it is completely skewed in favor of the broadcasters, and that is largely as a result of the regulations in place today. That is why I think the discussion that Representative Scalise started last year is a great way and I think that is probably what I heard today. And again, I commend Ranking Member Eshoo for her draft this week. I think people are realizing there is a problem.

Our proposal of a distant carriage, we think, brings the scales up to a level playing field, and here is why: We need to get local news to our consumers and the broadcasters want to tie that together with national content. They probably want to have all this tied together and us pay a premium price, 200, 300 percent increases.

I think if we are carrying another signal in an adjacent market even though our consumers don't get the local news, the broadcasters are incented to come to the table, get a deal, and we are incented to come to the table to get a deal because we both now have something that we want to offer our consumers that is not there at that time. But just saying take it or leave it or you will go black or there is nowhere for us to turn is not a free market negotiation.

Mrs. BLACKBURN. I yield back.

Mr. WALDEN. I will now go to Mr. Doyle, I believe.

Mr. DOYLE. Thank you, Mr. Chairman.

Mr. WALDEN. Mr. Doyle for 5 minutes.

Mr. DOYLE. Heavy on the Mister. Thank you, Mr. Chairman.

Well, I want to start out by reiterating something my friend and colleague Ms. Eshoo said. And I am very concerned about the blocking of online content in retransmission consent disputes. This is new ground that is being broken here that we have not seen before in any retransmission negotiations. And the most recent one where the broadcast blackouts affected 3 million people, the online subscribers to CBS.com, we are talking about 11 million people that were affected by that outside the area that was being negotiated, and I hope this doesn't become the new normal for our retransmission disputes.

Mr. Campbell and Mr. Rozzelle, you represent companies that provide video and broadband services to consumers. What do you think the reaction would be if your company blocked access to internet content as part of a retransmission dispute?

Mr. ROZZELLE. Congressman Doyle, I think it is very clear to us what would happen. It would be argued that we violated the net neutrality principles and that we were engaging in, if not unlawful conduct, immoral conduct.

I will tell you that I was—perhaps I am naíve here—but I was very surprised in a way that the FCC didn't say to CBS in this case you are a broadcaster operating as a public trustee in the public interest. The programming involved here was created as a result primarily of the licenses that you hold from us, and now, you have withheld that programming in another venue, but nevertheless, withheld that programming from members of the public and we don't find that to be in the public interest. And I am sorry they didn't do that. I think it would have been appropriate.

Mr. DOYLE. Mr. Campbell?

Mr. CAMPBELL. Representative Doyle, I really don't have anything to add. I think Mr. Rozzelle answered it quite well.

The only other thing I would point out is that, to go back to Representative Blackburn's suggestion if it is truly a free market, then the broadcasters maybe should return some of the free spectrum they got to offer that and bid on it. But I would have nothing to add to the online blockage other than Mr. Rozzelle.

Mr. DOYLE. Let me ask a question to again Mr. Rozzelle, Mr. Campbell, and Mr. Dodge. There seems to be an increase in the number of agreements between local broadcasters to co-own and operate equipment and facilities, and I want to say I believe in the value of local news and local programming and I believe that

broadcasters need to find innovative solutions to the advances of technology in the marketplace.

However, both DISH and Suddenlink and Public Knowledge mentioned in their testimony instances where joint agreements have resulted in separately owned stations in a single market jointly negotiating for retransmission consent. How have you seen this trend develop and what do you think the consequences have been?

Mr. DODGE. Well, the American Cable Association, or the ACA, did a study that showed in those scenarios where separately owned stations joined together in those so-called local marketing arrangements that the resulting cost to the distributors and ultimately consumers increased anywhere between 22 and 160 percent. And it is also my understanding that the Department of Justice starts to get interested in such things at about the 5 percent mark. So I think the numbers are pretty telling.

Mr. DOYLE. Mr. Rozzelle?

Mr. ROZZELLE. We have run into circumstances where in one market that we serve the ABC affiliate and the Fox affiliate, two of the big four, came to us together and it was a very, very difficult negotiation for us as a result.

I would say to you, sir, that if we step back and take a look at the result of the increasing retransmission consent fees and try to correlate those increases with increases in local programming as a result, which was the reason that this whole system was put in place to begin with, as I understand it, I don't think that correlation exists, not positive.

And so I think that this is a very difficult issue. I think Ranking Member Eshoo's bill is therefore more valuable today than it has ever been and we look forward to participating in that process.

Mr. DOYLE. Mr. Campbell?

Mr. CAMPBELL. Representative Doyle, as a new entrant, we are not in a lot of markets yet where we would probably be subject to these sort of arrangements, but obviously, we have heard about them. And, you know, as we grow, obviously if any of this happens, then we will be sure and provide that data.

Mr. DOYLE. Mr. Munson, I saw that you wanted to comment.

Mr. MUNSON. Yes, thank you. If I could make a few comments, Congressman.

Mr. DOYLE. Sure.

Mr. MUNSON. First of all, there is nothing illegal about these arrangements between television stations. If there was, the FCC wouldn't allow it. But the fact is that in my experience of doing retransmission contracts of this sort, there is never an option that is not given where a multichannel video provider could pick up just one of the stations. They always offer that. But there is a lot of exchange that goes back-and-forth between the cable company and the television station.

Mr. DOYLE. Mr. Chairman, I see my time is up and I thank you for your generosity.

Mr. WALDEN. We will now go to Mr. Barton for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman. I have got just one or two basic questions, maybe three.

The first thing I want each of the panelists to tell me who you think the primary stakeholder that you are representing is. And I will start with Ms. Aistars.

Ms. AISTARS. So I represent the Copyright Alliance and we are a coalition of 40 institutional members who are copyright owners, creators of all varieties. So I am speaking for the creative community.

Mr. BARTON. OK.

Mr. DODGE. Consumers.

Mr. BARTON. Just consumers?

Mr. DODGE. Yes.

Mr. BARTON. I hear chuckles at that but that is OK.

Mr. MUNSON. The National Association of Broadcasters and KPHO television and Meredith Corporation.

Mr. BARTON. Where is KPHO?

Mr. DODGE. We are in Phoenix.

Mr. BARTON. Phoenix, Arizona. OK.

Mr. ROZZELLE. Mr. Dodge stole my response, Congressman, but I am here representing Suddenlink Communications.

Mr. BARTON. Representing who?

Mr. ROZZELLE. Suddenlink Communications.

Mr. BARTON. What is Suddenlink Communications?

Mr. ROZZELLE. Suddenlink Communications is a cable operator. It serves about 1.4 million customers throughout the United States. And we are a member of the NCTA but I am here representing the company.

Mr. BARTON. OK.

Mr. CAMPBELL. Representative, Mr. Dodge once again stole my thunder.

We are representing our subscribers who are trying to bring a competitive choice in the marketplace against the incumbent providers and other video providers.

Mr. BARTON. So you are a cable company?

Mr. CAMPBELL. We are a telecommunications company. We offer video services over an IP TV network. We currently negotiate cable franchises in some cities where we operate under statewide franchising. But yes, it is a wire-lined facilities-based that currently passes over 1.5 million homes.

Mr. BARTON. OK.

Mr. BERGMAYER. And Public Knowledge is here to represent the interest of TV viewers.

Mr. BARTON. TV viewers.

Mr. BERGMAYER. Yes, sir.

Mr. BARTON. Do people subscribe to Public Knowledge? I mean is this kind of like Heritage Foundation or Common Cause?

Mr. BERGMAYER. We are not quite at that scale but we are a nonprofit public interest group.

Mr. BARTON. OK. Well, you know, I asked the question because the old days, you know, I knew who the broadcasters were and I knew who Comcast was and I knew who AT&T was, you know, and I knew who the local affiliate station was in my district. But you could put a gun to my head and I wouldn't be able to tell you without you telling me who you folks represent because the marketplace is totally different, totally different.

Now, I have at various times been a customer, which means I pay money for services of Time Warner Cable, Comcast Cable, Charter Cable. Currently, I am a paying customer for DIRECTV. I just switched from Comcast to Verizon FiOS, and I am in the process of switching from Charter to AT&T U-verse. OK. Both Verizon FiOS and AT&T U-verse are bundled services, which I get telephone service keeping my old telephone number, internet high-speed so-called service, and what I would call cable or television service. OK. And I pay a flat monthly rate, which is lower than the old separate rates.

Who can tell me what body is the dominant regulator of the bundled services that I now am receiving through Verizon FiOS and AT&T U-verse? Is it the FCC? Is it the cable? I mean who is it?

Mr. CAMPBELL. Representative, I think the answer is yes. In our case we offer the bundled telecommunications, video, and data. From a telecommunications perspective, the FCC and the State Public Utilities Commissions regulate that portion of the service.

From the video perspective, local governments and the FCC has some oversight but not as much as they used to—regulate the provision of cable service. And then the broadband is kind of out there in its own little world.

Mr. BARTON. Well, my time is about to expire, but the point of the first question and the point of the second question is the laws that are on the books had no conceptual ability to foresee what is now happening in the marketplace. And again, when AT&T was a phone company, we kind of understood the law regulating telephone service. And when Charter was a pure cable company, we understood the law of regulating cable television. Well, Charter has bundled services. All these groups have bundled services. And I don't think even you folks, as smart as you are, really can delineate who the dominant regulator is or even how to regulate if you need to regulate.

So, Mr. Chairman, my time is expired but that is why your hearings are so important and I really hope we can come up with a way to bring the regulatory scheme if we need one into the 21st century.

Mr. WALDEN. I thank the gentleman.

And I am just going to exercise the chairman's prerogative for just a minute because I think it is important we have a little fun and frivolity in these hearings, but when asked who you represent here, unless you are co-ops, you are probably also representing your investors and shareholders through a fiduciary responsibility. I recognize you are always representing your customers, but fundamentally, is anybody here not representing your owners?

Mr. DODGE. Yes, fair enough, Mr. Chairman. I wasn't sure where the question was going, but of course, I represent DISH Network.

Mr. WALDEN. That is what I thought you meant but I thought everybody might want to qualify that unless you are a co-op, right? Anybody disagree with that?

Mr. BERGMAYER. Not at all, no.

Mr. WALDEN. There you go. All right. Now, we go to, I believe, Mr. Latta.

Mr. LATTA. Thank you, Mr. Chairman. And thank you again to all of our witnesses today. I really appreciate hearing your testimony.

And if I could start with Mr. Rozzelle, in your testimony you state that whatever justification there was for the integration ban has long since been superseded by marketplace developments, and then you go on to state that consumers and operators, this has cost them more than $1 billion since it went into effect in 2007. I was wondering, could you expand and elaborate on what you gave us in your testimony about the integration ban?

Mr. ROZZELLE. Thank you for the opportunity, Congressman Latta. The figure, $1 billion, comes from a rough calculation that the cost of adding a cable card to the boxes that we distribute directly to our customers costs about $50 a box. It also adds significantly increased electrical cost associated with the operating of the box.

There are roughly 40 million cable cards out. The program has been successful. It was passed in 2007 and the country is full of cable cards. The relationship that we have with TiVo, which uses cable cards, is an example of the success of that program. And it is one of the big reasons why that experience that we have had and our continued operating premise, which is that any video customer that comes to us with a device from wherever it came will be supported by us if it wants to take our cable television services. Video services are so highly competitive that if we do not support them, they will go someplace else.

Mr. LATTA. Let me ask real quick when you say that you will support anything that is brought to you, does that put a technological strain on you or on your tech crews?

Mr. ROZZELLE. You know, I am no engineer, sir, so it is possible, I suppose, someone could show up on our doorsteps with something that simply wouldn't work, but if it is a device that was designed to work on our network, I can tell you that we would do everything that we reasonably could to make certain that we kept that customer happy.

Mr. LATTA. Thank you. And kind of following up if I could maybe ask everybody this question what Mr. Barton had brought up, you know, really where the laws are out there today. For each of you sitting out there today, you know, and we pretty much have heard from everyone that, you know, the laws are either outdated or we have problems. If each of you could just kind of briefly say if you had the opportunity, what law on the books would you want to get rid of or change today? And I will start ladies first.

Ms. AISTARS. I think as I said in my testimony, the Copyright Alliance represents largely copyright owners, and from a copyright perspective, statutory licenses are disfavored, and I think to a greater or lesser extent most of my members would agree that the existing licenses are an anachronism, but we also recognize that there are business practices that have grown up around them and so to unwind them we would have to, you know, give some further thought as to how to do that in a way that is not disruptive.

Mr. LATTA. OK. Mr. Dodge?

Mr. DODGE. So if the choice was completely getting rid of something versus targeted reform, then we would say get rid of the re-

transmission consent scheme to the core along the lines of what Mr. Scalise has proposed.

Mr. LATTA. Mr. Munson?

Mr. MUNSON. I guess I would say the ownership caps would be the first thing, but if I could mention one other thing.

Mr. LATTA. Oh, sure.

Mr. MUNSON. Thank you. And that is that there has been a lot of talk about whether the retransmission consent is broken or not, but I don't know if I am the only one on this panel—I think I am—that actually has negotiated a retransmission consent contract, and I find that it works. It ends up going down to the wire, as many negotiations with businesses do, but what is not broken here even though we have brick cell phones and everything else, but what is not broken here is when two companies get together, one company wants what the other one has and they get together and negotiate a deal, and then only 1/2 of 1 percent of the deals go public and end up with an impasse.

Mr. LATTA. I am running out of time here. Mr. Rozzelle?

Mr. ROZZELLE. Congressman Latta, I have also negotiated retransmission consent contracts and I would tell you that in the case of Suddenlink, they were almost always successfully negotiated because we simply didn't have any power at the table to do anything other than accept the deal we were given.

If I was going to affect a set of laws, I would affect the broadcast carriage laws that impact retransmission consent.

Mr. LATTA. Mr. Campbell?

Mr. CAMPBELL. I would echo Mr. Dodge and Mr. Rozzelle said. And I, too, have negotiated retransmission consent. Obviously, over the years the leverage has been swayed in favor of one side, and at some point this is accelerating upward, and the model breaks with these types of increases.

Mr. LATTA. Mr. Bergmayer?

Mr. BERGMAYER. Well, it is hard to pick just one but for these purposes basic tier buy-through, and our testimony has a number of provisions that should be sunsetted, listed.

Mr. LATTA. Thank you. Mr. Chairman, my time is expired and I yield back.

Mr. WALDEN. The gentleman yields back.

I will now go to Mr. Scalise for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman.

When we talk about the different challenges that each of you face, you each have different groups that you answer to, corporations, boards, customers. Ultimately, you are all trying to provide services and represent those people that create the great content that we all enjoy. And so when we have this conversation, the reason I appreciate the chairman's focus and the ranking member's interest in this is that I think we all want to make sure that the policy is smart and reflective of the world that we live in today.

And I bring the phone not just to point out that it cannot text the chairman or give him the LSU/Oregon score on this phone, but this was the modern device at the time these laws were written. And if you look at what you can do with this device today and you compare it to what you can do with this device, and when people realize that the laws that are on the books today that all of you

have to deal with were written for this, not for this and haven't been changed since this device was the modern device, it shows you how outdated the laws are but it shows you how complicated it makes your jobs and your daily lives.

And government needs to go and get with the times and figure out that you are living in a different world. You have to go in negotiations every single day dealing with the realities of modern technology. You couldn't even text somebody but you surely couldn't download video, audio.

The things you can do today have complicated the marketplace because now the laws are written in a way where you literally had one broadcaster sitting in a room with one cable operator. You had a monopoly negotiating against a monopoly. And maybe that worked back in that day but we are not in that day anymore.

Every consumer benefits from the fact that they have got multiple options. If they want to turn on the TV, they can get that through a cable wire, they can get it through a fiber, they can get it through a satellite, they can get it from so many sources but they can also go on their mobile device and just download it onto their iPhone or iPad or Galaxy or whatever device you have got. And yet, the rules are so rigid that it forces in some cases government picking winners and losers. In some cases you have complications you have got to go to the FCC to get a ruling. And the innovation that is lost is really what hurts the consumer. And that is really why we are here today.

I want to ask you, Mr. Campbell, because you all just recently rolled out Prism. It is a fairly new product, you know, that you are into this marketplace and video, and you have had to go through some of those growing pains in establishing these relationships and negotiations. And the negotiations are different depending on what kind of cable service or what kind of product you are trying to provide. Because if you are going to a broadcaster, it is a different negotiation than, for example, you know, you all are based in Monroe, Louisiana. We are proud to have you as a Fortune 500 company in Louisiana, but you are in Monroe. And a lot of people now know about Monroe because of Duck Dynasty, number one show in the country. We are very proud of that. They are from West Monroe they would tell you, not just Monroe.

But, you know, the reason 11 million people or so last week wanted to watch that show was because it is really good entertainment. But that is not a broadcast network. The number one show in the country is not a broadcast network or it is not CBS or ABC or NBC or Fox. It is A&E. So you are in negotiation with them to get that program that everybody wants is a lot different under the law than a negotiation with CBS or ABC or one of those broadcast stations, is that correct?

Mr. CAMPBELL. That is correct.

Mr. SCALISE. And so all you're asking for is a free marketplace where you want to pay people for their copyright. You know, our copyright artists, Ms. Aistars' clients, they provided content; they ought to get paid for it. But shouldn't that negotiation happen for A&E the same way as CBS because you are a consumer. You are just flipping through the channels. You want to watch a show. You know, why should one negotiation be ruled by the government in

a different way than the other channel when for the consumer, it is a seamless operation?

Mr. CAMPBELL. Representative Scalise, I have spent a lot of money at the Duck Dynasty shop for my children, by the way. But you are exactly right. A&E was created and there is no sort of scales that are tipped in their favor under the law that would give them an advantage over us in a negotiation. They have cleared their copyrights. Sometimes the broadcasters that we deal with, they don't want to clear all of those, which is part of the compulsory license issue.

But you are absolutely right. They are under no regulatory regimes so we sit down with them on one channel, we negotiate carriage, we come up with agreement, and we put them on.

Mr. SCALISE. And clearly, we want everybody to be treated fairly. We want you to have to go and whether it is CBS or A&E or any other channel, you know, go have a negotiation. If you come to an agreement, great; if not, you know, obviously, you go somewhere else. You look for other means to provide the service. But the broadcasters ought to be paid for their content, the artist who created the content ought to be paid, but it should be done in a free market. You shouldn't have must carry here and then you have got a buy-through, you have got free transmission consent, you have got compulsory copyright. There are all these things stacked on top of each other.

Broadcasters have limitations under current law. They can't even own multiple media outlets, yet if you are operating on the internet, you don't have any of those limitations. And yet you are competing against each other but one guy has got one set of rules he is playing by and somebody else has a different set of rules. And so all we are trying to do here is start this conversation to say, look, it might have worked in 1992. Things are dramatically different in a great way for us in terms of innovation but don't have these laws hold us back on the innovation for today. And that is why the conversation not only needs to start but ultimately we need to get to the point where we can actually get to text, get to a position where we can update and modernize these laws to reflect what is happening in the world we are in today.

And I appreciate all of you for what you do to provide great services because customers love it, but we ought to make sure it is being done in a free and open marketplace that reflects today's technology.

Mr. CAMPBELL. Thank you, Representative.

Mr. SCALISE. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. WALDEN. Thank you, Mr. Scalise, for your work.

We will turn out to Mr. Lujan for 5 minutes.

Mr. LUJAN. Mr. Chairman, thank you very much and to you and to the ranking member for the work you have been doing in this space.

The conversation that we are having today, as complex as it is, but a reality that hits everyone across this country as we look not only for information for valuable content and entertainment as well. So thanks to everyone for being here.

I want to recognize as well the important work that the broadcasters do in making sure that during times of emergency we are able to get that local news. There is actually flash flood warnings taking place in my district as we speak. There was a tornado that was spotted early this morning that warnings went out to the community that we are able to depend on that.

But on the same note, as we talk about that, when these conversations are taking place with the breakdown that took place between CBS and Time Warner and content is shut off, that valuable asset, if consumers don't have redundancy, my rabbit ears are now, I guess, the digital form of those in the home, and our form of redundancy at least for me is my smartphone, which I think would be redundant. But if internet content was even cut off and now that I couldn't see it on my television, I couldn't go to my device and try to pull it up because I still have internet connectivity whether it is through whatever my phone is receiving or through the internet signal that I still have in the home, that concerns me.

And I think that in the same vein that I talk about the importance of the critical service that is provided, it concerns me that this shutout can take place from a blanket perspective.

And I don't know if, Mr. Munson, we can talk about that a little bit to see what we can do to prevent that from happening when, at the very least, this is occurring. And I say that because the broadcasters know I still have a lot of concerns about orphan counties. And, at least in New Mexico, we still haven't solved this problem. And we need to because there are still places in New Mexico that those that are subscribers or that live in rural areas—and I invite anyone to drive out with me to New Mexico. It takes 8–1/2 hours to cross my district alone, rural in nature. And there are a lot of people living in these rural towns that count on receiving local information, but now, because of the way that some of these lines are drawn they don't get local news; they get news from the neighboring State but maybe not some of the warnings that they would like to hear as well. So, you know, that is a whole other issue.

But in regards to where sometimes the conversations break down and it is the consumer that was left out of that warning, can you talk about that a little bit, Mr. Munson?

Mr. MUNSON. Yes, thank you, Congressman.

First of all, I want to reiterate something I said in my opening statement, and that is that we never went dark. CBS never went dark in those markets. Their transmitters were on. They were broadcasting at full power during the entire time. People can receive our signals. We have spent a lot of money on a very robust system. As you know, in the southwest, we count on translators in many cases to repeat that signal through large areas of land to reach as many people as we can possibly reach with the over-the-air signal.

Mr. LUJAN. Well, Mr. Munson, I don't want to interrupt, sir, but then it goes back to redundancy. And my question is if I am going to make an investment in my home to put a digital receiver so that I can receive the broadcast feed off of that, then should I be open to what is being suggested by the chairman and the ranking member to say that I have made the investment to receive that digital

signal, so I get my local affiliates for free. So then why am I paying for them on my DISH feed or my cable feed?

Mr. MUNSON. Primarily——

Mr. LUJAN. And I think we need to be careful when we say that it is constantly being said because then, as a consumer, where am I? If I am going to invest in what I believe is redundant again to my smartphone and through what I perceive to be able to get information over the 'net but even that was chopped off, then my redundancy is the investment with what I need to do, especially in a rural area. And so, you know, a feed in New York City is different than a feed in New Mexico.

Mr. ROZZELLE. Congressman, if I might, one of the redundant features that exists is your local cable television operator because he has an emergency alert system. And that is triggered by, as you know, various stages from the Federal Government all the way down to the local entity. And that includes weather alerts as well. I thought I would point it out.

Mr. LUJAN. Well, I think that is fair but in a day that—and, Mr. Chairman, I see my time has run out—we are highlighting the importance of a broadcast feed never going down and always being fed. I guess that is where I am caught a little bit now as I am looking at this closer when trying to understand what that means.

So if I am watching my local channel, CBS goes out, that is the channel that I watch. I know that when I turn it on, it is blank; it says talk to your cable subscriber or talk to whatever it is so we can try to get this figured out, is that emergency broadcast still going to run on that channel or am I going to have to flip the channel in hopes—because probably I am going to turn it off and then I am going to go to my smartphone if I know that something is happening.

Mr. MUNSON. It does run on our television station, yes.

Mr. LUJAN. So even with that signal, even with that little note up there, I would still get the message?

Mr. MUNSON. In the particular case you have described, if it were to happen to have an impasse between a cable company and a broadcaster, nothing is passed through because there had been an expiration of that particular contract.

I want to also mention again that we are talking about 1–1/2 percent or a half of 1 percent of the times we enter into these negotiations as broadcasters it ended up in an impasse. It is unfortunate and it is particularly outlined, as we talked about in the CBS/Time Warner, it was very public and 30 days long. But that is a rare occurrence in these negotiations. There are probably people negotiating as we are sitting here in new retransmission deals that we don't know about.

Mr. LUJAN. I appreciate it. Thank you, Chairman.

Mr. WALDEN. And I think your point is it is still over-the-air broadcast so it is not a complete blackout. If you have an antenna, you still get CBS? It is just not available on a cable or satellite provider, depending on who is having the blackout.

Mr. MUNSON. That is correct, Chairman. Yes, sir.

Mr. LUJAN. Thank you. Thank you, Mr. Munson. I appreciate that.

Mr. MUNSON. Thank you.

Mr. WALDEN. We will now go to the gentleman from Colorado, Mr. Gardner.

Mr. GARDNER. Well, thank you, Mr. Chairman. And I had hoped that Mr. Scalise would still be here because for the record he still brings his 8-track player.

But thank you very much, all of you, for being here. I particularly welcome Mr. Campbell and Mr. Dodge for your representation today. Both of you are responsible for creating thousands of jobs in my district and across the State of Colorado, so I thank you so much to both of you for being here.

Now, with regards to the topic of today's hearing, there are two primary concerns that I have. One is a consumer's ability to get what they want at a reasonable price and the free market mechanisms that allow that to happen. But it seems like we are more and more facing impasses as we try to achieve those 2 goals of the free market and giving the consumer what it is that they want at a reasonable price.

Broadcasters come before the committee and our office and say that everything is working the way it should, but others say that it is not working the way that it should. And I will tell you in Congress when we get accused of things working or not working, we end up with negotiations, concessions, those kinds of words that pop up, compromise. Each side has to give a little, a bit for the sake of the people who are affected to try to meet the two concerns I addressed of the consumer.

And so I don't purport to have an answer and I don't know that anybody here on this committee has purported to have all of the answers or to say that there is one proposal that will fix this situation. But the fact is that there are still blackouts and that consumers are paying the price both figuratively and literally. But in my mind one blackout is one too many, especially when it is one that affects so many millions of people. And I think we can all agree on that. And sadly, it isn't just one and it hasn't been just one. The rising cost of programming and the number of retransmission consent disputes and impasses leads me to believe that we do have a problem.

So with that, I have a few questions for our witnesses. To Mr. Dodge, could you please explain a little bit more about your plan? Would you pay broadcasters in the adjacent market if you were to import their signal? And what would this do to help the problem that we all see?

Mr. DODGE. Yes, we would. The imported signal if you will would be compensated under the current distant network signal royalty scheme, which is negotiated with each reauthorization of STELA, SHVERA, whatever flavor it is with the copyright holders and represents a fair market rate. And the idea would be that when a local signal is down we could import an adjacent market signal, which, as I noted in my opening remarks, is quite an imperfect substitute. It allows people to continue to have access to the core network programming but there would be no local content, so there would still be an incentive for both parties to negotiate and reach a fair deal to retrans at the local station.

Mr. GARDNER. You spoke about it earlier in your opening statement in terms of this being a permanent solution. This is not a per-

manent solution because I mean if you want to watch the Denver Broncos, you are not going to be thrilled if you have to watch the Cleveland Browns. Of course——

Mr. DODGE. Many would say that.

Mr. GARDNER [continuing]. In this case it has worked out very well for us.

But will this process though help you get a solution though for consumers, a settlement so to speak?

Mr. DODGE. We think it will because it will somewhat level the playing field which today we think is quite out of skew. And there is sort of two goalposts, which I think are represented by Representative Scalise's bill and Ranking Member Eshoo's bill, which in one you can do a complete deregulatory approach or you can try and level the playing field a little bit so there are fair negotiations.

Mr. GARDNER. And to Mr. Munson, during the last hearing, I asked each panel member if they believed the current system was a free market system and why. And I had one broadcaster respond by stating that it was in fact a free market. And that I will quote from the hearing: "In terms of retransmission consent, we view that as a mechanism of actually entering into negotiation, and I think one of the tenants of our businesses we spent a lot of money in creating content and we want to be able to, you know, get an appropriate return on that content."

And so my question to you, with regard to the proposal that is outlined in the testimony today to import distant signals even if a cable company is willing to pay you for importing a distant signal, you are still opposed to that idea? And you are opposed even if it is over a short period of time? And why is that?

Mr. MUNSON. My experience is, Congressman, that it would prolong the dispute, not shorten it. By bringing another CBS affiliate in in this particular case, first of all, it violates the long-held contract that I have with the television network for the exclusivity for the CBS product, in this case Phoenix. You can't import ESPN from another market if you have a dispute with ESPN. You can't say, well, I want to bring the ESPN signal from Tucson into the ESPN market into Phoenix. Why would it be any different to import the CBS signal, which violates our contract?

It really goes to the core of localism. As you have already mentioned, it destroys the localism. Bringing a distant signal in with television commercials, with programs, news programs, traffic, weather that doesn't reflect that particular community destroys the whole idea behind localism, which was the foundation of over-the-air broadcasting.

Mr. GARDNER. So I mean do you think that what we have today is a free market system, a system that works in the free market?

Mr. MUNSON. I do. I think that having the deadline—I mentioned this earlier—having a deadline, while gut-wrenching for the parties at some times, it generally brings the parties together. But by prolonging it, by bringing another station in, it artificially kicks the can down the road with the deadline, and therefore, the parties don't negotiate and get a deal done.

Mr. GARDNER. Mr. Chairman, I yield back.

Mr. WALDEN. The gentleman yields back. Looks like we go now to gentleman from Missouri, Mr. Long.

Mr. LONG. Thank you, Mr. Chairman, and thank you all for being here today for your testimony. It looks like maybe I am the cleanup hitter today.

So, Mr. Dodge, let me start with a question for you. Do you think that DISH and others involved in efforts to change these retransmission consent laws, do you think that you and others are working hard enough out in the marketplace as it exists today to reach successful deals?

Mr. DODGE. We do.

Mr. LONG. I am sorry?

Mr. DODGE. Yes, we do.

Mr. LONG. You do? OK. Earlier, you said in your testimony when it was your turn at the microphone there you said that blackouts are occurring with more frequency and last longer. So if that is the case, if they are happening with more frequency and they are for a longer period of time, just ballpark, but how many disputes has your company been involved in over, say, the last 5 or 6 years?

Mr. DODGE. Actually, I don't have a number of the top of my head.

Mr. LONG. Can you get it for me?

Mr. DODGE. Of course.

Mr. LONG. OK. Because I would kind of like to know what—because if we are doing everything we can out there in the marketplace to, you know, prevent these and then they are happening more and more with more frequency and lasting longer, I would kind of like to—if you can get me an answer to that, I would appreciate it.

Mr. DODGE. Of course.

Mr. LONG. OK. Thank you. And is it Aistars?

Ms. AISTARS. Aistars, yes.

Mr. LONG. Ms. Aistars, OK. The satellite compulsory licenses were created, as we saw—I don't know if it was Joe Barton's phone that Scalise held up there or what, but they were created a quarter of a century ago and for very specific reasons of course at that time, as you are well aware of.

So looking at the satellite compulsory licenses 25 years or better, are those reasons still relevant today with what we have heard today and all of the new technology and everything?

Ms. AISTARS. Thank you for the question.

As I said when I introduced myself, I am a copyright lawyer rather than a Communications Act lawyer, and so I think some of the justifications for the creation of those licenses were more steeped in communications law than copyright law, although they reside in Title 17.

But I guess I would just say that the marketplace is vibrant with a variety of new services, as you have pointed out. You can do more today with the devices you have in your pocket than ever before. There is more creative content available to consumers through a variety of new services. And so I am enthusiastic about video marketplaces as we see it today, and I don't see that it is in need of any new regulation.

Mr. LONG. OK. OK.

And with that, Mr. Chairman, I yield back.

Mr. WALDEN. Does the gentleman yield?

Mr. LONG. I already yielded back, yes. Do you want me to yield to somebody?

Mr. WALDEN. Yes, he was asking.

Mr. LONG. Oh, I am sorry.

Mr. WALDEN. Mr. Lujan.

Mr. LONG. Now, you don't have a Vermont accent.

Mr. LUJAN. No, sir. I have got this one over here but——

Mr. LONG. That is not what it says on the TV monitor.

Mr. WALDEN. And is that really a Missouri accent? That is what I want to know. No one knows.

Mr. LUJAN. I thank the gentleman for yielding. I guess just a few follow-ups with what was said.

Mr. Munson, I really appreciate the response to Mr. Gardner associated with where these territories and markets were drawn and they give you your competitive advantage for the space that you operate in, but it also impacts a dilemma that I am trying to solve in my State in my district with orphaned counties. The consumers are not given the choices with what content they want delivered to them because someone drew an arbitrary line based on a population center, based on a market penetration of where the epicenter is for advertising. They get whatever content is going to be thrown at them.

In this day and age I think with DISH through my Slingbox I can get the content recorded and then I can watch it digitally anywhere that I have access to the internet that there is enough bandwidth for the video stream capacity. So I get my local content from New Mexico when I am here that way. But in a day and age where I am able to subscribe to a suite of information, there should be no reason that, based on some lines that were drawn that leave my consumers out if they want information.

But as I have described before in this committee, if they are savvy enough as far as a DISH Network or DIRECTV subscriber and they go get a Post Office Box in an area that gets local programming, no matter where they are, I could do it here. I could have a DISH Network or DIRECTV network here. I could get billed to my New Mexico address and set the thing up here and I could get all the local programming that I want from New Mexico.

It seems that something is broken in a way that I today based on a law that is preventing consumer choice should be able to get whatever programming from Arizona, California, Colorado, or New Mexico that I so desire as well.

And so I just wanted a little bit of time to explain that that is a concern that I have with where these lines were drawn with how it is hurting my consumers when they want local news and they can't even get that.

Thank you, Chairman. And I yield back.

Mr. WALDEN. The gentleman yields back. And I think that wraps up what I think has been a traffic hearing. We really appreciate all the testimony, your answers to our questions. And, as you know, we don't have to tell you this is a complicated issue that we are trying to work our way through.

We also know STELA has a timeline and a clock on it. We also know there are a lot of people who want to hang every caboose and main car and everything else onto STELA if they can. So we are

going to be having further discussions about the video marketplace as we go forward.

And with that, the committee stands adjourned.

[Whereupon, at 4:41 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Opening Statement of Chairman Fred Upton
Communications and Technology Subcommittee Hearing on
"Innovation Versus Regulation in the Video Marketplace"
September 11, 2013

The Energy and Commerce Committee is committed to fostering a smaller and more effective government for the innovation era. Furthering that effort, the Subcommittee on Communications and Technology today turns to the video marketplace to examine whether the laws for the video market are keeping pace in our age of innovation and competition.

The video marketplace has been addressed by Congress numerous times, but those laws are showing their age. We first enacted the Satellite Home Viewer Act – STELA's great-great-grandfather – in 1988 when the video landscape was much different. Cable's governing statute was enacted in 1992 when its business was booming and competitors like direct broadcast satellite service were in their infancy. And the broadcast regulations derive from the era of Cronkite and Brinkley, not the era of YouTube and Netflix.

Currently, the satellite industry serves one-third of America's pay-TV audience; broadcasters are experimenting with new digital and mobile services; cable providers are offering broadband and telephone service; and the Internet has opened the video market and lowered barriers for new players who are hoping to transform the way we all watch television.

This hearing will put our video laws in context of today's video marketplace. Our responsibility, as lawmakers, is to ensure that as technological advancements and breakthroughs transforms the video marketplace, government is not standing in the way. Statutes and regulations adopted during a bygone era may not only be hindering innovation but worse, may impose inefficiencies that harm businesses, consumers, and jobs. We should also bear in mind as we look at this marketplace that a free market, without the interference of the government and in which every company in the video value chain is compensated for their contribution, is best for all involved.

I welcome this review and look forward to hearing from our witnesses.

September 11, 2013
Innovation vs. Regulation in the Video Marketplace
Opening Statement of Rep. Leonard Lance

Thank you Mr. Chairman.

I thank you for holding this hearing as we continue to look at possible actions this Committee may take in conjunction with dealing with the STELA provisions that expire at the end of next year. I have found the previous hearings to be very informative and helpful as we frame this debate for the coming year.

I thank all of our witnesses for sharing their views with us this afternoon; they represent a cross-section of the various entities in the video industry that are affected by today's regulatory and statutory framework that governs how all of our constituents receive video services.

There is a place for some federal regulation in this space but it should treat like services in the same fashion. I am concerned that many of the rules and regulations that govern the provision of video services treat MVPDs differently based primarily on the type of technology used to deliver that service. Federal regulations should be technology neutral and applied uniformly across industry actors providing the same service.

There is no reason that the federal government should treat traditional cable operators any differently from satellite companies or telecom providers who offer the same type of service to customers. Unfortunately, as many of our witnesses point out in their submitted testimony, this is not necessarily the case today in our siloed regulatory structure.

We have an incredibly vibrant marketplace today; all three technologies I have mentioned are represented in the top five MVPDs measured by number of customers and the market is hosting frequent new entrants as customers turn to broadband and mobile sources to supplement their entertainment choices. In light of such a competitive marketplace my preference is to keep the heavy hand of government out of private negotiations as much as possible. A competitive and free open market will deliver a greater value for American consumers. It is incumbent upon us as lawmakers to ensure that federal regulations and statutes are not unnecessarily interfering with the free market and are limited only to situations where intervention is absolutely necessary.

This Subcommittee in the past has attempted to move legislation updating these laws and I appreciate that the Chairman is taking the time to study whether we should make another attempt to do so in the context of STELA. I look forward to a robust debate from our Members and witnesses this afternoon.

Once again, I welcome our witnesses here today and thank the Chairman for holding this hearing; I yield back the balance of my time.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
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Minority (202) 225–3641

December 20, 2013

Ms. Sandra Aistars
Executive Director
Copyright Alliance
1224 M Street, N.W., Suite 101

Dear Ms. Aistars:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, September 11, 2013, to testify at the hearing entitled "Innovation Versus Regulation in the Video Marketplace."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Tuesday, January 14, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

January 14, 2014

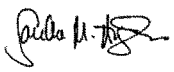
The Honorable Greg Walden
Chairman
House of Representatives Committee on Energy and Commerce,
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington D.C. 20515

Dear Chairman Walden:

Thank you for the opportunity to testify before the Subcommittee on Communications and Technology on September 11, 2013 at the hearing entitled "Innovation Versus Regulation in the Video Marketplace," and for the opportunity to answer the further questions posed by Rep. Bobby Rush for the record. My responses to the questions are set forth below. Please note that in some instances the questions concern issues outside the mandate of the Copyright Alliance's activities and raise nuanced and complex matters of telecommunications law about which the Copyright Alliance has not taken a position.

Thank you again for the opportunity to take part in your Subcommittee's important deliberations.

Best regards,



Sandra M. Aistars
Chief Executive Officer
Copyright Alliance
1224 M St. N.W.
Suite 101
Washington D.C., 20005

Response Of Sandra Aistars, Chief Executive Officer, Copyright Alliance To Questions For The Record By The Honorable Bobby Rush

1. Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, "multichannel video programming distributor" (MVPD) in the Communications Act?

As many of you know, the DC Circuit Court of Appeals heard oral arguments this week in the case of Verizon vs. FCC, which challenges the Commission's authority under the Communications Act to promulgate "so-called" net neutrality rules.

If the DC Circuit were to VACATE or to order the Commission to revise its rules substantially, how might that affect parties' abilities to negotiate retransmission consent agreements "in good faith" and at arms-length?

2. Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?

Response:
Happily, because creators are pursuing diverse modes of distribution, audiences have more choices than ever before for viewing films and television programs. Services such as Netflix, Hulu, VUDU, HBOGO, Crackle, MUBI, Amazon, and EpixHD; devices such as AppleTV and Roku; and technologies such as UltraViolet enable consumers to watch what they want, when they want, where they want. The creative community has embraced all of these options, and is continually creating more opportunities for audiences.

These examples show that the technologies and business models underlying the video industry are evolving daily and at an ever-increasing pace. The creative community is innovating and experimenting with different ways of creating, funding, and delivering video to viewers. This experimentation is healthy and spurs the development of other delivery systems. We must allow and incentivize artists to create, entrepreneurs to innovate, and markets to operate in this burgeoning environment without imposing the constraints of new compulsory licenses on them.

With respect to revising the existing definitions in the Communications Act, and to the Commission's authority to promulgate so called "net neutrality" rules, these questions concern issues outside the mandate of the Copyright Alliance's activities and raise nuanced and complex matters of telecommunications law about which the Copyright Alliance has not taken a position.

We respectfully refer you to the comments filed by several of our members on these topics in the ongoing FCC In the Matter of
Public Notice on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, MB Docket No. 12-83.

Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.

3. I know that the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts' interpretations of federal communications and copyright law is more defensible?

4. If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.
Response
Article I, Section 8 of the Constitution grants Congress the authority "to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As one of the few constitutionally enumerated powers of the Federal government, this grant of authority reflects the Founders' belief that copyright protection is a significant governmental interest, and that ensuring appropriate rights to authors would drive innovation and benefit society. Ensuring the author's right to control the distribution of his or her works is key to these societal benefits.

It is axiomatic that to benefit society, copyright law must have a dual purpose: to create a framework that encourages both creation and dissemination/commercialization of works. As the Court explained in Golan v. Holder, "Nothing in the text of the Copyright Clause confines the "Progress of Science" exclusively to "incentives for creation." Evidence from the founding, moreover suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science. Until 1976, in fact, Congress

made "federal copyright contingent on publication[,] [thereby] providing incentive not primarily for creation, but for dissemination. [Later Supreme Court] decisions correspondingly recognize that "copyright supplies the economic incentive to create *and disseminate* ideas." [1]

Since the dissemination of works properly requires the consent of the author, the history and development of copyright law reflects both economic and other societal goals. A creator's control over the use of his or her work – the right to determine how and when to license it – drives innovation and creativity.

Numerous of our members are currently actively engaged in litigation in the line of cases you reference, and we expect to learn soon whether the Supreme Court will accept certiorari to decide the issues posed in those cases. The Copyright Alliance has submitted a brief as amici curiae in support of the Petition by the American Broadcasting Companies, et. al. for a writ of certiorari in *American Broadcasting Companies v. Aereo, Inc.* to review (and reverse) the decision of the U.S. Court of Appeals for the Second Circuit. (attached hereto as an exhibit for the record). As we note there:

"For over 35 years, the copyright, broadcast, cable and technology industries had the expectation that all retransmission of copyrighted content over the Internet would be subject to consent, compensation, or both. Yet, as a result of the Second Circuit's decision below, Aereo has become an exception to the rule. No logical reason for this exception exists: instead, Aereo was based on perceived "assembly instructions" from *Cartoon Network LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), cert. *denied, Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) [*hereinafter "Cablevision"*]. According to the *Aereo* court, *Cablevision* permits avoidance of the copyright law if a provider makes intermediate (and unnecessary) copies of transmitted works, from which copies the programming is "played back" on a near-live basis.

The practical consequences of allowing this loophole in the law are substantial. First, they threaten to upend a long-established structure that ensures the integrity of the copyright laws: to promote the development and dissemination of creative works. Allowing certain parties to circumvent this structure will cut into these incentives to create works and other programming, and to make it available to the public to consume and enjoy.

[1] Golan v Holder, 565 US __ (2012)

The decision below also has the effect of creating perverse incentives to the technology community to prioritize the creation of sham technology that evades the law, rather than technology that is truly innovative and best serves the public. It should be left to public demand and the ingenuity of the technological community to drive the development of technology that best distributes the programming, to which that technology owes its existence. To allow a handful of lawyers to determine the trajectory of this country's technological development is shortsighted and unwise.

But the *Aereo* decision threatens to have consequences well beyond the broadcast industry, extending to those who rely on and interpret this country's copyright laws. It reinforces a statutory misreading of the law set out by the Second Circuit five years earlier in *Cablevsion* – one that the Government expressed concerned about when this Court was considering granting certiorari. Worse, the *Aereo* decision builds upon the error by establishing "guideposts" that have no foundation in the law. In the interim, other courts have rejected the application of *Cablevision* to Aereo-like technologies. This has created conflicting results, including a situation in one district where the technology is both legal and illegal at the same time.

The Court should not tacitly approve these types of outcomes. They do not serve the fundamental principles underlying this country's jurisprudence. Instead, permitting the ruling to stand will embolden others to seek ways to avoid compliance with the law, rather than encouraging the bar and American businesses and citizens to comply with the statutes and legal principles that this Court is tasked with interpreting."

Mr. Munson pointed out in his testimony that added regulations on broadcasters "stem from what some have characterized as a 'social contract' between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers."

Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend Report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Notwithstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.

5. Do any of you challenge or take issue with the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?
6. Other than the reinstitution of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of minority viewers and consumers gets carried over the public airwaves, using public rights-of-way?
Response
The questions posed concern issues outside the mandate of the Copyright Alliance's activities and raise matters of telecommunications law about which the Copyright Alliance has not taken a position. We note, however, that some of our members and their affiliates are themselves minority TV broadcast [I'd be careful here. If you mean TV & cable channels OWNED by minorities very few come to mind & which of these are your members?} and channel owners and/or specifically aim to serve minority viewers and audiences. We do not challenge the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences as non-minority owned broadcasters and cable systems are. As you correctly note, members of the Copyright Alliance have individually expressed support for the reinstitution of the minority tax certificate and are active in encouraging efforts to ensure that programming and news meeting the critical needs of minority viewers and consumers is carried over the public airwaves as well as via cable channels.

Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.

7. Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiation over retransmission consent agreements?
Response
The question posed concerns issues outside the scope of the Copyright Alliance's activities and raise matters of telecommunications law about which the Copyright Alliance has not taken a position.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

December 20, 2013

Mr. R. Stanton Dodge
Executive Vice President and General Counsel
DISH Network LLC
1110 Vermont N.W., Suite 750
Washington, D.C. 20005

Dear Mr. Dodge:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, September 11, 2013, to testify at the hearing entitled "Innovation Versus Regulation in the Video Marketplace."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on January 14, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Stanton Dodge's Responses to Congressman Bobby Rush's Questions for the Record from September 11, 2013 Hearing Entitled "Innovation Versus Regulation in the Video Marketplace"

Submitted January 28, 2014

1. **Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, "multichannel video programming distributer" (MVPD) in the Communications Act?**

   DISH has not yet taken a position on this matter.

   As many of you know, the DC Circuit Court of Appeals heard oral arguments this week in the case of Verizon vs. FCC, which challenges the Commission's authority under the Communications Act to promulgate "so-called" net neutrality rules.

   If the DC Circuit were to VACATE or to order the Commission to revise its rules substantially, how might that affect the parties' abilities to negotiate retransmission consent agreements "in good faith" and at arms-length?

   DISH is still reviewing the potential impacts (if any) that the DC Circuit's decision may have on the parties' abilities to negotiate retransmission consent agreements "in good faith" and at arms-length. Separately from the net neutrality decision, we believe that the broken retransmission consent system is a major problem for DISH's business and its customers. The video laws passed in 1992 no longer reflect the marketplace (there was no satellite video business then and no Internet). Unfortunately, the broadcasters are exploiting the failure of Congress to update the rules for this Century. As a result, consumers' bills are rising and blackouts are at an historic high.

2. **Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?**

   DISH was pleased that the D.C. Circuit found that the Federal Communications Commission has authority to promulgate rules governing broadband providers' treatment of Internet traffic. We were disappointed that the court vacated the anti-blocking and anti-discrimination rules, but we believe the Commission has the ability on remand to craft new rules that will comply with the DC Circuit's decision and protect consumers.

   Regarding another line of cases, it appears that the DC Circuit and the US Second circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.

3. **I know that the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts' interpretations of federal communications and copyright law is more defensible?**

   DISH has not yet taken a position on these cases.

4. **If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.**

   DISH has not yet taken a position on these cases.

   Mr. Munson pointed out in his testimony that added regulations on broadcasters "stem from what some have characterized as a 'social contract' between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers."

Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend Report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Notwithstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.

5. **Do any of you challenge or take issue with the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?**

DISH has not yet taken a position on this issue.

6. **Other than the reinstitution of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of minority viewers and consumers gets carried over the public airwaves, using public rights-of-way?**

Congress, as part of the STELA re-authorization, should pass meaningful retransmission consent legislation. The broken retransmission consent regime is in dire need of comprehensive reform. In the past few years we have seen an escalating number of blackouts arising from impasses in negotiations between the broadcasters and their distributors. And, these blackouts are lasting longer than in the past, and impacting millions more subscribers.

Among other things, we have voiced support for proposals such as interim carriage authority, which would temporarily permit a distant signal to be imported during a retransmission consent dispute. That measure would alleviate the problem of service disruptions and prevent the use of consumers as pawns. And, the broadcaster whose signal is imported will be compensated under the already established distant signal royalty rate. If the broadcaster's local content is as valuable to consumers as they assert, then the imported distant network is an inferior substitute, and both parties would continue to have every incentive to reach an agreement. The imported distant signal simply fills the void for the network programming.

We also support the Video CHOICE Act introduced by Ms. Eshoo and Ms. Lofgren. If passed, the legislation would give consumers greater choice over their programming, tackle the growing problem of bundling of cable channels with network channels, and empower the Federal Communications Commission with significant authority to curtail blackouts.

Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.

7. **Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiation over retransmission consent agreements?**

DISH does not believe that providing sensitive pricing information of video providers online would lead to more productive negotiations.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

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COMMITTEE ON ENERGY AND COMMERCE

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Majority (202) 225–2927
Minority (202) 225–3641

December 20, 2013

Mr. Edward L. Munson, Jr.
Vice President and General Manager
KPHO-TV
4016 North Black Canyon
Phoenix, AZ 85017-4730

Dear Mr. Munson:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, September 11, 2013, to testify at the hearing entitled "Innovation Versus Regulation in the Video Marketplace."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on January 14, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Responses to Questions for the Record from Mr. Edward L. Munson

Questions from the Honorable Bobby Rush

1. **Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, "multichannel video programming distributor" (MVPD) in the Communications Act?**

Answer:

The FCC currently has an open proceeding on the appropriate scope of the "multichannel video programming distributor" definition. While it is clear that new technologies and services are changing the way viewers consume video content, NAB does not believe Congress should intervene at this time. If Congress were to consider any revision to the term "MVPD" it should ensure that new technologies and services are prohibited from expropriating broadcast signals. Broadcasters must maintain the ability to control the distribution of their signals over the internet and to negotiate for compensation from broadband video providers seeking to retransmit broadcast signals.

2. **As many of you know, the DC Circuit Court of Appeals heard oral arguments this week in the case of Verizon vs. FCC, which challenges the Commission's authority under the Communications Act to promulgate "so-called" net neutrality rules.**

   If the DC Circuit were to VACATE or to order the Commission to revise its rules substantially, how might that affect parties' abilities to negotiate retransmission consent agreements "in good faith" and at arms-length?

   Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?

Answer:

NAB does not believe that the FCC's rules on net neutrality and retransmission consent are interrelated, or that the court's decision has any relation to the ability of parties in a retransmission consent negotiation to bargain "in good faith."

3. **Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.**

   I know that the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts' interpretations of federal communications and copyright law is more defensible?

Answer:

NAB agrees with the courts that have noted that creating inefficient systems purely to avoid copyright law is not good policy and circumvents the law. NAB's position is more fully explained in the attached *amicus* brief filed by NAB in support of a recent petition to the Supreme Court in the *American Broadcast Companies, Inc. v. Aereo, Inc.* litigation.

4. **If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.**

Answer:

NAB agrees with the courts that have noted that creating inefficient systems purely to avoid copyright law is not good policy and circumvents the law. A more detailed legal argument is contained in the attached *amicus* brief filed by NAB in support of a recent petition to the Supreme Court in the *American Broadcast Companies, Inc. v. Aereo, Inc.* litigation.

5. **Mr. Munson pointed out in his testimony that added regulations on broadcasters "stem from what some have characterized as a 'social contract' between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers."**

   Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Notwithstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.

   Do any of you challenge or take issue with the proposition that minority TV broadcasters and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?

Answer:

NAB shares your desire for broadcast ownership to better reflect our diverse society. The transition from analog to digital television has offered a new opportunity for increased diversity on the broadcast dial. For the first time, stations can offer new, innovative and niche streams on their multicast channels. Multicast channels offer new diverse programming options for viewers, such as the minority-owned Bounce TV and Soul of the

South television networks, which air programming that targets African American viewers. Many markets have seen multicast broadcast programming options specifically tailored to Latino, Indian, Chinese, Japanese and other audiences.

One of the potential obstacles to increased diversity, however, may be the upcoming incentive auction which could reduce the diversity of programming on broadcast television. By design, the incentive auction will reduce the number of full power and low power broadcast stations, which will thereby reduce the opportunity for minorities to own television stations. Furthermore, according to press reports, television stations that choose to participate in the auction will likely be those less profitable stations, some of which could be stations that program to minority populations and offer unique minority-centric programming. When designing the incentive auction, NAB is hopeful the FCC will take into consideration the potential impact on diversity.

6. **Other than the reinstitution of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of minority viewers and consumers gets carried over the public airwaves, using public rights-of-way?**

Answer:

NAB has supported reinstatement of the tax certificate for the purpose of promoting greater diversity in ownership of broadcast television and radio stations. NAB also has advanced several proposals before the FCC that are intended to promote ownership diversity. These include: (i) an incubator or waiver program that would give broadcasters incentives to provide technical and financial assistance to qualifying businesses entering broadcast ownership; and (ii) modifying FCC rules to allow sellers of broadcast stations to hold a reversionary interest in broadcast licenses pursuant to certain guidelines to incentivize sellers to be more willing to finance a station purchased by a qualifying owner by retaining the ability to reacquire the station in the event of a default. Such measures also could be taken up by Congress to encourage increased minority ownership of broadcast outlets.

7. **Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.**

Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiation over retransmission consent agreements?

Answer:

The current public file rules require television broadcasters to place sensitive advertising price information online. This is a rule that is ONLY applicable to broadcasters, not any other video platform that competes directly with broadcasters, such as cable, satellite or teleco companies. NAB believes that if broadcasters must comply with this regulation, then other competitors in the video marketplace should have to fulfill the requirement as well. NAB does not believe there is any connection between whether retransmission consent negotiations are meeting the good faith standard and whether or not this public file requirement is placed upon our competitors.

No. 13-461

IN THE

Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., *et al.*
Petitioners,

v.

AEREO, INC., F/K/A BAMBOOM LABS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS, THE ABC TELEVISION AFFILIATES ASSOCIATION, THE CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, THE NBC TELEVISION AFFILIATES, AND THE FBC TELEVISION AFFILIATES ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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November 2013 — *Counsel for Amici Curiae*

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INTEREST OF AMICI CURIAE

The National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the FBC Television Affiliates Association (collectively, the "Broadcaster Associations") are associations representing the interests of television broadcasters.[1] The National Association of Broadcasters (NAB) is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating before Congress, the Federal Communications Commission, and the courts on behalf of its members. The majority of NAB's members are not large entities; they are local, independent stations.

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the FBC Television Affiliates Association represent hundreds of local television stations affiliated with the national ABC, CBS, NBC, and FOX television networks, respectively. Together, the Broadcaster Associations'

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief, and their letters consenting to the filing of all *amicus curiae* briefs have been filed with the Clerk.

members serve millions of viewers in every state in the country.

The Broadcaster Associations have a compelling interest in promoting adherence to copyright and communications laws that govern public performances of television programming and retransmission of broadcast signals to the viewing public. Without adherence to these laws, broadcasters could not fulfill their obligation to offer television programs that meet the needs and interests of the communities they are licensed to serve. Unauthorized retransmissions of broadcast programming siphon viewers away from lawfully authorized sources, which include over-the-air broadcasts, cable and satellite subscription services, and authorized online distributors. As a result, the Broadcaster Associations' members lose advertising revenues and retransmission fees essential to recouping the significant costs of acquiring, producing, and distributing local and national programming. This undermines broadcasters' ability to create new innovative programming and distribution mechanisms, and threatens existing programs, such as original local news and community affairs programming, that are costly to produce.

INTRODUCTION AND SUMMARY OF ARGUMENT

Quality broadcast television, delivered for free over the air by local stations, is a public good, as Congress has long recognized. But free over-the-air television is not cost-free and cannot be taken for granted. Aereo and others following in its footsteps seek to subvert a carefully constructed legal framework with a technological gimmick, and the federal judiciary is divided on whether Aereo has succeeded. This is an important, cleanly presented question of federal law, and there is little to gain – and much to be lost – if review by this Court is delayed.

1. Broadcast stations serve their communities by delivering quality programming, including local news programs, on which the public relies. Nearly 60 million Americans, including many low-income households, rely exclusively on over-the-air broadcast signals. Still more watch broadcast programming through multichannel video programming distributors (MVPDs). Over-the-air broadcasting involves substantial costs, including capital expenses, network affiliation fees, licenses for popular syndicated programs, and the personnel, equipment, and facilities needed to produce informative news programs and emergency coverage.

Congress has struck a careful balance that protects the interests of broadcasters and others. Overriding earlier decisions of this Court, Congress decided that cable systems may not retransmit copyrighted broadcast programs without consent, but created a compulsory licensing system to facilitate

these systems' access to such programming. Separately, Congress granted broadcasters rights in their signals, including the right to negotiate with MVPDs for the ability to retransmit those signals. Together, this interlocking set of provisions assigns distinct benefits and burdens to broadcasters, MVPDs, and copyright owners.

The decision below subverts this balance by allowing Aereo to exploit broadcasters' creative efforts and investment by retransmitting their programs and signals for a profit, without producing anything and without paying broadcasters anything. Aereo does this through a technological gimmick, using thousands of dime-sized antennae and identical digital copies to simultaneously retransmit live television programming and signals to its paying subscribers, while claiming these are not "public performances." As Judge Chin explained, this system clearly constitutes an unauthorized public performance under the plain text of the Copyright Act: it is a "device or process," used to transmit copyrighted television programming, *i.e.*, the "performances," to "paying strangers," *i.e.*, "the public."[2] The panel majority's view that the system is saved by its "technical details" is foreclosed by the text of the statute and is inconsistent with its purpose and legislative history.

2. Courts are divided over the legality of Aereo and similar systems. Some courts have rejected challenges to it, while others have issued

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[2] Pet. App. 43a-44a (Chin, J., dissenting).

injunctions covering large portions of the country; the issue is currently pending in three circuit courts, all on substantially identical and virtually undisputed facts. Although the Second Circuit is the only court of appeals that has ruled on the issue to date, the judiciary has developed two well-articulated but competing readings of the Copyright Act. Delaying review of the cleanly presented question of law in this case would not aid this Court in vetting additional issues or otherwise assist this Court.

Instead, delay would only exacerbate the significant harms being suffered by broadcasters. As several courts have found, Aereo and similar schemes:

(i) seriously undermine the value of network and local advertising, the largest revenue stream supporting free, over-the-air broadcasting;

(ii) impair broadcasters' ability to negotiate for retransmission consent fees, their second-most important revenue stream;

(iii) interfere with authorized online distribution of broadcast programming, an increasingly important issue for broadcasters; and

(iv) threaten to cause a migration of popular network programming to subscription services, and present local broadcasters with difficult financial decisions with respect to costly programming on which their communities rely.

This Court should consider the legality of Aereo's "Rube Goldberg-like contrivance"[3] now, before the economic foundations of free, over-the-air local broadcasting are irrevocably weakened.

ARGUMENT

I. Aereo Subverts Congress' Careful Balance Through Technological Contrivance.

A. Broadcasters Provide Important Services To Their Communities At Substantial Cost.

1. "[T]he importance of local broadcasting outlets can scarcely be exaggerated."[4] As of September 30, 2013, there were 1,387 full-power commercial stations operating in the United States,[5] each licensed by the Federal Communications Commission (FCC) to serve the needs and interests of a particular geographic area.[6] Some commercial broadcast television stations are owned and operated

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[3] Pet. App. 40a (Chin, J., dissenting).

[4] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 177 (1968) (internal quotation mark omitted)).

[5] News Release, FCC, Broadcast Station Totals as of September 30, 2013 (Oct. 24, 2013), http://tinyurl.com/FCC9-30-13.

[6] *See* FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, 28 FCC Rcd. 10,496, 10,573 (2013) [hereinafter *Video Competition Report*].

by the network with which they are affiliated, but the majority are independently owned.[7]

The most-watched broadcast television stations make three principal forms of programming available. *First*, most of these stations obtain a significant amount of their programming from the national network with which they are affiliated, such as ABC, CBS, NBC, and FOX.[8] *Second*, stations obtain syndicated programming from content providers.[9] And *third*, stations broadcast locally-produced news, sports, public affairs, and related programming of particular interest to the station's community of license.[10]

Broadcasters' role in delivering the news is especially significant, and "[i]n many ways . . . more important than ever," according to a recent FCC report.[11] On a "typical" day, "78% of Americans get news from a local TV station."[12] These stations

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[7] *Id.* at 10,573-74.

[8] *Id.*

[9] *Id.* at 10,574.

[10] *Id.*; *see also* National Association of Broadcasters, *Broadcasters' Public Service: TV Stories*, http://tinyurl.com/TVStories (last visited Nov. 7, 2013) (compiling examples of public service provided in broadcast news and other programming).

[11] Steven Waldman, FCC, The Information Needs of Communities 13 (July 2011), *available at* http://tinyurl.com/FCCWaldman.

[12] Pew Research Center, Understanding the Participatory News Consumer 10 (March 1, 2010), *available at* http://tinyurl.com/PewNewsConsumer.

increasingly "fill the void" in investigative journalism left by changes in other media sectors.[13] And broadcast news plays an irreplaceable role in emergency situations, when the viewing public as well as law enforcement authorities rely on the wall-to-wall coverage provided by local stations.[14]

2. Local broadcasters make this programming available to the general public free of charge through over-the-air service. Approximately 22.4 million American households, accounting for nearly 60 million people, rely exclusively on over-the-air broadcast signals, including 30 percent of households with annual incomes under $30,000.[15] As the FCC has noted, "[f]or many people, free, over-the-air television is their primary source of news, information and emergency alerts – not to mention entertainment."[16]

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[13] Barb Palser, *A Promising New Venue: TV stations and their digital outlets may play a more prominent role in investigative reporting*, American Journalism Review, Aug. 27, 2012, http://tinyurl.com/AJRPalser.

[14] For example, the FCC and FEMA called on citizens to "[t]une in to your local television or radio stations . . . for important news alerts" related to Hurricane Sandy. Advisory, FCC, FCC Provides the Public With Important Tips for Communicating in the Aftermath of Hurricane Sandy (Oct. 31, 2012), http://tinyurl.com/FCCSandy.

[15] Press Release, National Association of Broadcasters, Over-the-Air TV Renaissance Continues as Pay TV Cord-Cutting Rises (June 21, 2013), http://tinyurl.com/NABRenaissance (citing GfK Media & Entertainment, The Home Technology Monitor (2013)).

[16] Press Release, FCC, Ten Days and Counting to DTV Transition (June 2, 2009), http://tinyurl.com/DTV10Days; *see* (continued...)

Millions more watch broadcast television stations as retransmitted – with authorization – by a cable system, satellite carrier, or other multichannel video programming distributor (MVPD) to which viewers pay a monthly fee.[17] Because the most popular local and national television programs appear on broadcast stations, MVPDs typically are willing to pay for the right to retransmit popular stations.[18]

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also Rethinking the Children's Television Act for a Digital Media Age: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 111th Cong. 7 (July 22, 2009) (Statement of Julius Genachowski, Chairman, FCC) ("Broadcast television remains an essential medium, uniquely accessible to all Americans.").

[17] About 100 million television households subscribe to an MVPD. Some households receive local television signals both over-the-air and via an MVPD for different television sets within the household. Nearly 18 million households subscribing to an MVPD service have one or more television sets unconnected to the service. *See* Comments of the National Association of Broadcasters, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, at 2 (Sept. 10, 2012), *available at* http://tinyurl.com/NABComments (citing GfK-Knowledge Networks, Home Technology Monitor, 2012 Ownership Survey and Trend Report (Spring 2012/Mar. 2012)).

[18] *See Video Competition Report*, 28 FCC Rcd. at 10,521-23. MVPDs routinely label top broadcast programming as "must-have" in their advocacy before the FCC. *See* Joint Reply Comments of Broadcasters, *Amendment to the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, at 6 & n.27 (June 27, 2011), *available at* http://tinyurl.com/RetransComments; *see also* TVB, TV Basics 11 (June 2012), http://tinyurl.com/TVBasics (broadcasters aired 96 of the top 100 most-watched programs in 2011-12).

3. Bringing top-quality national and local programming to the public entails significant costs for broadcasters. Local stations face substantial capital expenses for their transmission facilities and invest heavily in innovation.[19] They pay network affiliation fees and other compensation to acquire exclusive rights to popular network programming in their local markets, as well as licensing fees to acquire exclusive local rights to syndicated programming.[20] Broadcasters may pay syndication fees of up to $2.5 million in barter and cash for a single episode of top shows such as *Modern Family* and *The Big Bang Theory*.[21] Stations also incur significant costs to produce local programming, including hiring reporters and camera crews, purchasing news vans and other equipment, and maintaining production facilities. A survey of television stations reported that, on average, they spend over $4 million per year in their news operating budgets and over $700,000 in their news capital budgets.[22] Finally, stations provide expensive-to-produce news coverage on which the

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[19] *See Video Competition Report*, 28 FCC Rcd. at 10,605-06. For example, as of the end of 2011, over 80% of full-power stations were broadcasting in high-definition. *Id.* at 10,500.

[20] *Id.* at 10,587-88, 10,599.

[21] *Id.* at 10,588.

[22] *See* Comments of the National Association of Broadcasters, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC GN Docket No. 10-25, at 5-6, 33 (May 7, 2010), *available at* http://tinyurl.com/FutureNewMedia.

public depends, such as commercial-free reporting during times of emergency.[23]

B. Congress Has Struck A Balance To Protect Local Broadcasters, MVPDs, Copyright Holders, And Ultimately, The Public.

Broadcast television is available for free over the air to viewers; it is not and could not be free to all entities for all purposes. Like any business, commercial television broadcasters would suffer devastating harm if other commercial enterprises could appropriate their product freely and without compensation. Congress has crafted a comprehensive statutory scheme to ensure that this does not happen.

The right to authorize public performances of a copyrighted audiovisual work is an exclusive right secured to copyright holders.[24] Prior to 1976, decisions of this Court held that retransmissions of broadcast programming by cable systems were not "performances" of that programming, allowing cable systems to retransmit broadcast television for free.[25] But Congress concluded that these decisions posed a serious threat to the broadcast industry and

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[23] *See id.* at 16 (reporting that a single season's hurricane coverage cost one local station $160,000 even before accounting for lost advertising revenue).

[24] 17 U.S.C. § 106(4).

[25] *See Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

abrogated them in the Copyright Act of 1976.[26] As the legislative history confirms, Congress specifically decided that a "commercial enterprise[]" – like Aereo – "whose basic retransmission operations are based on the carriage of copyrighted program material" – again, like Aereo – should pay "copyright royalties" to the "creators of such programs."[27]

At the same time, Congress was concerned that individual negotiations with every copyright owner would be "impractical and unduly burdensome." It therefore created a narrowly tailored compulsory licensing regime, *not* universally applicable, but limited to cable operators and later satellite providers.[28] Thus, Congress struck a balance: copyright holders receive robust protection that applies to retransmission of broadcast programming, but select entities – cable and satellite systems – are granted a streamlined licensing mechanism.[29]

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[26] Pub. L. No. 94-553, 90 Stat. 2541; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-10 (1984).

[27] H.R. Rep. No. 94-1476, at 89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704.

[28] *See Capital Cities Cable, Inc.*, 467 U.S. at 709 (quoting H.R. Rep. No. 94-1476, at 89); 17 U.S.C. §§ 119, 122. In determining to "act as narrowly as possible," Congress highlighted the importance of not derogating from the "property rights" of copyright holders more than necessary. S. Rep. No. 106-42, at 10 (1999).

[29] These congressionally-created compulsory licenses also include conditions on MVPDs, violation of which results in full copyright liability. *See* 17 U.S.C. § 111(c)(2)-(4); 17 U.S.C. § 119(a)(4)-(7); 17 U.S.C. § 122(d)-(f).

Distinct from the copyright interests in broadcast programming, Congress enacted the Cable Television and Consumer Protection and Competition Act of 1992,[30] and the Satellite Home Viewer Improvement Act of 1999.[31] These statutes created a separate right for broadcasters in their signals and allowed commercial television stations to bargain regarding the right of MVPDs to retransmit those signals.[32]

Together, these interlocking statutory provisions strike a careful balance designed to serve the public interest:

- *Over-the-Air Broadcasts*: Each local broadcast station receives a license from the FCC to transmit program services on a particular frequency, and is required to operate the station in a manner that serves the public interest.

- *Retransmission Consent*: Local commercial broadcast stations have control over retransmission of their signals by MVPDs. Because of the demand for the mix of programming they make available,[33] network-

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[30] Pub. L. No. 102-385, 106 Stat. 1460.

[31] Pub. L. No. 106-113, 113 Stat. 1501.

[32] *See* 47 U.S.C. § 325(b)(1).

[33] *See* Reply Comments of the National Association of Broadcasters, *Amendment of the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, Ex. A., Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves, at 15 n.28 (June 27, 2011), *available at* http://tinyurl.com/EisenachCaves.

affiliated television stations typically negotiate compensation from MVPDs for the right to deliver the broadcast signal to subscribers ("retransmission consent").[34]

- *Copyright Owners*: Copyright holders authorize broadcasters to publicly perform their works over the air, but this permission does not necessarily carry over to other platforms. Only cable systems and satellite carriers may bypass direct negotiations with rights holders through a statutory compulsory licensing system; other would-be retransmitters must obtain individualized consent.[35]

C. Aereo's "Rube Goldberg-Like Contrivance" Violates The Plain Text Of The Copyright Act and Circumvents Its Purpose.

Unauthorized streaming of copyrighted programming to the public over the Internet is illegal.[36] To its subscribers, Aereo functions just like

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[34] *See Video Competition Report*, 28 FCC Rcd. at 10,521.

[35] *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278-87 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013). *ivi* held that an online service that streamed live, copyrighted broadcast programming without consent could be held liable for publicly performing such programming. As Judge Chin recognized, the litany of harms the Second Circuit identified with respect to ivi "appl[ies] with equal force" to Aereo. Pet. App. 57a (Chin, J. dissenting).

[36] *See, e.g., ivi*, 691 F.3d at 275; *Warner Bros. Entm't, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011); (continued...)

the indisputably infringing services that came before it. Aereo, however, claims it is different because it employs a convoluted technological ruse: in making live television programs available to its subscribers, it claims to use "thousands of individual dime-sized antennas" to make identical "unique copies" that it then transmits simultaneously to as many subscribers. This "Rube Goldberg-like contrivance, over-engineered . . . to take advantage of a perceived loophole in the law," does not change the basic fact that Aereo is "publicly performing" copyrighted works in violation of the Copyright Act.[37]

The exclusive right to "perform the copyrighted work publicly" includes the right to "transmit or otherwise communicate a performance . . . to the public, by means of any device or process" (the "Transmit Clause").[38] The expansive language of the Transmit Clause makes clear that a performance is public "whether the members of the

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Stipulated Consent Judgment and Permanent Injunction, *CBS Broad. Inc. v. FilmOn.com, Inc.*, 10-cv-7532-NRB (S.D.N.Y. Aug. 9, 2012), ECF No. 49; *Twentieth Century Fox Film Corp. v. ICraveTV*, Nos. Civ.A. 00-120, Civ.A. 00-121, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000); *see also Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Prop., Competition and the Internet of the H. Comm. on the Judiciary,* 112th Cong. 6, 11 (2011) (statement of Maria A. Pallante, Register of Copyrights) ("As streaming becomes an increasingly popular means of accessing creative works . . . , it will continue to be attractive to infringers. Unfortunately, the problem of unauthorized streaming is here to stay.").

[37] Pet. App. 40a (Chin, J., dissenting).

[38] 17 U.S.C. § 101.

public capable of receiving the performance or display receive it in the same place or in separate places, and at the same time or at different times."[39] As Judge Chin explained, Aereo fits squarely within the statute: its "system of thousands of antennas" is a "device or process," and it uses that system to transmit copyrighted television programming, *i.e.*, the "performances," to "paying strangers," *i.e.*, "the public."[40] This common-sense interpretation is also supported by the legislative history of the Copyright Act of 1976, which explains that Congress intended to cover "all conceivable forms and combinations of wired or wireless communications media," in order to anticipate future technological developments.[41]

The panel majority incorrectly reasoned that the "technical details" of Aereo's system allow it to thwart this straightforward application of the law.[42] According to the majority, the Transmit Clause applies only if "'a *particular transmission of a performance*'" can be received by the public; each "transmission sent by Aereo" to its subscribers is "generated from [a] unique copy" of the television program, so that copy is not transmitted to "the public."[43] But the Act says nothing about whether the underlying "performance" is "transmitted" to "the

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[39] *Id.*

[40] Pet. App. 43a-44a (Chin, J., dissenting).

[41] H.R. Rep. No. 94-1476, at 64.

[42] Pet. App. 33a.

[43] Pet. App. 18a (quoting *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 135 (2d Cir. 2008) ("*Cablevision*")).

public" using one copy or multiple (technologically unnecessary) copies. To the contrary, the Transmit Clause "does not use the terms 'copy' or 'copies'" at all.[44] Instead, in language that is remarkable for its comprehensiveness and breadth, the statute applies to "*any* device or process," without regard to whether the underlying work is transmitted to members of the public "in separate places" or "at different times." Nothing in this statutory text accords talismanic significance to the "technical details" of the device or process used to transmit a copyrighted television program to paying subscribers.

Beyond its lack of textual justification, Aereo's contrivance plainly subverts the balance Congress struck. Like broadcasters, Aereo transmits programming to the public. But unlike broadcasters, it pays nothing for that programming and has no duty to serve the public. Like MVPDs, Aereo re-transmits broadcast signals and profits from charging monthly subscription fees to viewers.[45] But unlike MVPDs, it does not negotiate with rights holders, pay any fees, or comply with any of the

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[44] Pet. App. 146a (Chin, J., dissenting from denial of reh'g en banc).

[45] In this respect, Aereo's commercial retransmission service is not remotely similar to an individual viewer recording copyrighted programming for personal viewing at a later time, or even to a retailer whose products can be used by others for that purpose. *Cf. Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Analogizing the actions of a for-profit retransmitter to those of an individual viewer was the exact approach Congress rejected when it abrogated *Teleprompter Corp.* and *Fortnightly Corp.*

statutory conditions Congress imposed upon MVPDs.[46] Like copyright holders, Aereo profits from valuable programming. But unlike copyright holders, it does none of the innovation, supplies none of the creativity, and contributes none of the financial investment. This is not a legitimate function contemplated by Congress's carefully calibrated regime; it is simply free-riding.

II. This Court's Review Is Necessary To Bring Stability And Certainty To The Broadcasting, MVPD And Content-Producing Industries.

Although only one court of appeals has ruled on the legality of Aereo's scheme to date, the state of the law is now in considerable disarray, and there is little reason to expect the circuits to converge on a single consensus view. The legal status of Aereo and its ilk is literally all over the map: challenges to Aereo have been rejected in the Second Circuit and in Boston,[47] while a competitor with a virtually identical service has been enjoined from operating in the Ninth Circuit[48] and *separately* enjoined from

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[46] In addition to payment of fees, these conditions include compliance with certain FCC rules, reporting requirements, prohibitions against alterations in programs, and prohibitions or other limitations against the importation of distant signals into a broadcast station's local market. *See supra* note 29.

[47] *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649, 2013 WL 5604284 (D. Mass. Oct. 8, 2013), *appeal docketed*, No. 13-2282 (1st Cir. Oct. 16, 2013).

[48] *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012), *appeal docketed* (continued...)

operating anywhere outside the Second Circuit.[49] Appeals are pending in the First, Ninth, and D.C. Circuits. Just days before the petition in this case was filed, local broadcasters and a national network filed a copyright infringement suit against Aereo in Utah.[50] Aereo's aggressive expansion plans foretell even further expansion of this legal playing field.[51]

This is not a case where further percolation would aid this Court in vetting legal issues or identifying a suitable vehicle for review. Across the country there are now two competing readings of the Copyright Act being applied to virtually identical and almost entirely undisputed facts. One view – that a copyrighted television program may not be artificially sliced into discrete "transmissions," and each one delivered to paying subscribers without authorization – has been adopted by two appellate judges and two district courts.[52] The contrary view has been defended at length by two appellate judges and two district courts. Delaying review would

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sub nom. Fox Television Stations, Inc. v. Aereokiller, LLC, Nos. 13-55156, 13-55157 (9th Cir. Jan. 25, 2013).

[49] *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758, 2013 WL 4763414 (D.D.C. Sept. 5, 2013), *appeal docketed*, No. 13-7146 (D.C. Cir. Sept. 17, 2013).

[50] Complaint, *Community Television of Utah, LLC v. Aereo, Inc.*, No. 2:13-cv-00910 (D. Utah Oct. 7, 2013).

[51] Press Release, Aereo, Inc., Aereo Announces Expansion Plans for 22 New U.S. Cities (Jan. 8, 2013), http://tinyurl.com/AereoExpansion.

[52] Judge Wesley endorsed Judge Chin's interpretation of the Transmit Clause. *See* Pet. App. 128a (Chin, J., joined by Wesley, J., dissenting from denial of reh'g en banc).

achieve little more than allowing additional courts to line up behind one fully developed approach or the other, without vetting new issues, resolving factual disputes, or otherwise improving the record for this Court's ultimate review.

Delay in reviewing Aereo's illegal conduct will instead only exacerbate the significant – and, as several courts have found, irreparable[53] – harms faced by broadcasters. And the harm to local stations points to a broader harm: to the system of national and local broadcast television service that has long benefited the public.

1. Aereo's technological contrivance undermines the largest revenue stream supporting free, over-the-air television: advertising. Aereo audiences are "not measured by Nielsen" ratings, meaning broadcasters cannot command advertising revenues commensurate with their viewership.[54] Since 88 percent of broadcast revenue is derived from

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[53] *See FilmOn X LLC*, 2013 WL 4763414, at *29-32 (identifying several categories of irreparable harm broadcasters will suffer without preliminary injunction); *BarryDriller Content Systems, PLC*, 915 F. Supp. 2d at 1147 (same). Even the district court in this case agreed that broadcasters would suffer various irreparable harms in the absence of an injunction. Pet. App. 109a-116a.

[54] Pet. App. 110a. The industry "relies on [the] Nielsen [Company's] data to measure broadcast television station audiences" and thereby determine advertising rates. *Video Competition Report*, 28 FCC Rcd. at 10,592.

advertising, even small differences in ratings points can have a huge financial impact on local stations.[55]

Aereo and services like it may further diminish advertising revenues by diverting viewers out of their local markets. Aereo's purported controls against out-of-market viewing are illusory – customers are invited to watch programming from any available market so long as they click a button that says, "I swear, I am in market."[56] More fundamentally, the Second Circuit's reasoning allows Aereo and its sister services to offer streaming of out-of-market stations. If an unauthorized streaming service allows Californians to watch New York programs – three hours early, and with commercials for New York car dealerships instead of California ones – it would further "reduce the value of . . . local advertisements."[57] Enabling this viewing of out-of-market television stations would also destroy local stations' bargained-for program exclusivity rights. These are the very harms Congress sought to prevent in significantly restricting, and in some

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[55] *See id.* at 10,583.

[56] Decl. of Dr. John P.J. Kelly ¶¶ 74-75, *Am. Broad. Cos., Inc. v. Aereo, Inc.* (S.D.N.Y. Apr. 30, 2012) (reproduced in the joint appendix before the Second Circuit at A-1838). By clicking the "in market" button, the viewer is invited to state that she is located within the authorized viewing area for the station in question, even if she is actually outside that area.

[57] *ivi*, 691 F.3d at 286.

cases outright prohibiting, the importation of out-of-market stations.[58]

2. Aereo also directly jeopardizes retransmission consent fees, broadcasters' second-most important revenue stream. These fees represent a "substantial and growing revenue source for the television programming industry."[59] The threat to this revenue comes not only from Aereo, which retransmits broadcast programming for profit without paying these fees; large MVPDs are already exploring ways to take advantage of a legal regime in which paying for programming is apparently optional.[60] Aereo's very existence gives cable companies "leverage to negotiate deals with

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[58] *See* 17 U.S.C. § 111(c)(1) (requiring cable systems to comply with FCC rules, including those enforcing limitations on the importation of distant signals); 47 C.F.R. §§ 76.92, 76.101, 76.120; *see also* 17 U.S.C. § 119(a)(6) (restricting "violations of territorial restrictions" by satellite carriers).

[59] *ivi*, 691 F.3d at 285; *see also Video Competition Report*, 28 FCC Rcd. at 10,599-600 (retransmission consent fees represent $2.36 billion in broadcast station industry revenues in 2012, up from $1.76 billion in 2011).

[60] *See* Andy Fixmer et al., *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, Bloomberg, Oct. 26, 2013, http://tinyurl.com/DirecTVAereo ("DirecTV, Time Warner Cable Inc. (TWC) and Charter Communications Inc. (CHTR), taking a page from Aereo Inc., are considering capturing free broadcast-TV signals to avoid paying billions of dollars in so-called retransmission fees."); Shalini Ramachandran, *TV Service Providers Held Talks With Aereo*, Wall St. J., Apr. 1, 2013, at B1 (reporting that Aereo has discussed partnerships with major pay-TV distributors, including AT&T and DISH Network).

broadcasters on more favorable terms."[61] Even if the Court eventually rejects the Second Circuit's flawed construction of the Copyright Act, the fundamental economics of broadcast television will already have been undermined by years of bargaining in the shadow of Aereo.

3. Aereo is also undermining broadcasters' negotiating position with respect to authorized online distribution. Ensuring that broadcasters have the exclusive "first run" of popular programming ahead of Internet sources is an important point of negotiation between broadcast television stations and their programming suppliers, including the networks with which they are affiliated.[62] "[N]egotiated Internet retransmissions – for example, on Hulu.com – typically delay Internet broadcasts so as not to disrupt plaintiffs' broadcast distribution models, reduce the live broadcast audience, or divert the live broadcast audience to the Internet."[63] Aereo subverts the carefully negotiated balance between first-run live broadcasts and authorized Internet viewing.

4. In combination, the harms described above will reduce broadcasters' ability to continue offering costly and diverse national and local programming free over-the-air. Aereo's free riding creates a

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[61] *See* Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, FierceCable, Apr. 26, 2012, http://tinyurl.com/BrittAereo.

[62] *See Video Competition Report*, 28 FCC Rcd. at 10,607-10.

[63] *ivi*, 691 F.3d at 285.

substantial danger that quality programming will migrate from broadcast television to pay services.[64] Local broadcasters will also face difficult choices. As entities licensed to serve their local communities, broadcasters strive to avoid scaling back programming on which the public depends. However, with both advertising and retransmission consent revenues jeopardized, expensive-to-produce local news coverage, such as wall-to-wall emergency reporting, faces clear financial challenges.[65]

All of these costs are real and immediate, and their confluence "threaten[s] to destabilize the entire industry," not just one market or one company.[66] In addition to Aereo's own expansion, other would-be free-riders are likely to follow the Second Circuit's roadmap for unauthorized retransmission. Indeed, the derivatively-named "Aereokiller" service (since re-named FilmOn X) was consciously "designed to take advantage of the logic of the recent court ruling

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[64] For example, in the wake of the Second Circuit's decision, News Corp. President and COO Chase Carey stated that FOX may convert to a subscription-only model, explaining that "[w]e simply cannot provide the type of quality sports, news, and entertainment content that we do from an ad supported only business model." Ira Teinowitz, *FOX-Aereo Dispute Could Force Network Off Broadcast TV, Says Chase Carey*, The Wrap, Apr. 8, 2013, http://tinyurl.com/CareyAereo. Executives at CBS and Univision have echoed these sentiments. Brian Stetler, *Broadcasters Circle Wagons Against A TV Streaming Upstart*, N.Y. Times, Apr. 9, 2013, http://tinyurl.com/CBSAereo.

[65] *See supra* Part I.A.3.

[66] *ivi*, 691 F.3d at 286.

in the Aereo litigation."[67] Until this Court intervenes, unauthorized streaming services are likely to proliferate, and so too will the harms to broadcast television.

Before this Court is a cleanly presented and important question of law: whether an unauthorized retransmission service is legal simply because it uses thousands of technologically unnecessary antennae and digital copies instead of one. The Court should resolve that important question now, before the economic pillars of free, over-the-air local broadcasting are compromised.

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[67] Ted Johnson, *NBC, ABC, CBS Board Suit Against Barrydriller.com*, Variety, Aug. 13, 2012, http://tinyurl.com/VarietyBD.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for writ of certiorari, the Court should grant the petition.

Respectfully submitted,

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December 20, 2013

Mr. Dave Rozzelle
Executive Vice President
Suddenlink Communications
12444 Powerscourt Drive, Suite 450
St. Louis, MO 63131

Dear Mr. Rozzelle:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, September 11, 2013, to testify at the hearing entitled "Innovation Versus Regulation in the Video Marketplace."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on January 14, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

David Rozzelle
[redacted]

Ms. Charlotte Savercool
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

January 6, 2014

Dear Ms. Savercool:

Attached are my answers to the questions for the record sent to me by letter of December 20, 2013. The questions pertain to the hearing of September 11, 2013 on AInnovation Versus Regulation in the Video Marketplace@ held by the Subcommittee on Communications and Technology.

Please note that as of January 1, 2014, I have retired from Suddenlink Communications. If there are additional questions that should be directed to Suddenlink, they should be addressed to: Mike Zarrilli, Vice President for Government Relations, Suddenlink Communications, [redacted] If there are additional questions addressed to me, they should be sent to the addresses above.

Respectfully submitted,

David Rozzelle

Question from The Honorable Henry Waxman:

Advocates for retransmission consent reform have proposed a standstill during disputes, so consumers don't experience blackouts. Just last week, the cable industry won a case in the Second Circuit overturning an FCC rule requiring a standstill during program carriage disputes. Why is a standstill to preserve consumer access to programming appropriate in the retransmission consent context but not during program carriage disputes?

Answer:

Viewed from a consumer's position in the programming distribution process, television broadcasters have long been required to produce programming serving the broader public interest given their status as public trustees of the broadcast spectrum, which belongs to the people of the United States. That historical obligation has led to a reliance by television viewers on broadcasters to provide news and public interest programming on a daily and regular basis. The often cited examples are local news and weather, including breaking news stories that may have high local importance and local weather alerts. Broadcasters have been steadily moving away from this obligation, but the relationship persists and references to the public trustee nature of the broadcasters' role continue.

Again, from a consumer's perspective, no such relationship exists with national network programming like MTV, ESPN, Comedy Central, Spike, USA, Cartoon Network, etc. While there are networks that provide very valuable news and weather information, they are a small portion of the overall national network inventory.

Having said the above, it should be noted that outside the Big Four network affiliates, there is virtually no vestige of the public trustee obligation evident. Perhaps that is one reason that almost all those stations, if they elect retransmission consent ("RTC") status on their own, select must carry. Among the Big Four, the quality of local programming efforts has become very inconsistent since the amount and quality of public interest programming is no longer measured in any meaningful way by the FCC. Nevertheless, in most markets there is a news and public affairs leader that truly should be available to consumers at all times.

Thus, the loss of local television broadcast programming has a much higher probability of causing public harm than the loss of national entertainment networks.

As explained above, I believe there is logical reason to treat RTC disputes and program carriage disputes differently. One should have public interest values to protect, at least among the Big Four stations; the other usually does not.

Finally, I would note that in the Time Warner v. FCC case, the standstill argument was a secondary argument in a much larger discussion of the First Amendment rights of distributors of video programming in the context of a broad federal policy with the stated goal of promoting

greater programming diversity by granting special carriage rights to a select group of content providers.

Questions from The Honorable Bobby Rush:

Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, multichannel video programming distributor (MVPD) in the Communications Act.

Answer:

I believe the technologies are changing rapidly. I believe the programming distribution model is changing in a slower, but evolutionary way. Traditionally, MVPD status has meant a video program distributor that owns and operates a facilities based network which is used in whole (as in the case of satellite), or in part (as is the case with cable and telephone) to provide video service to the end user. At least one on-line video distributor (OVD) has legally claimed to be an MVPD for copyright purposes, but not for other obligations, such as must carry. Its argument did not prevail.

To make matters more complex, the rights and obligations are not uniform across MVPDs. Satellite has certain obligations peculiar to the nature of its technology as does cable. Indeed, as an MVPD, cable has more obligations than any other form of video distribution.

Therefore, I believe that the entire structure of the MVPD regulatory scheme should be considered if there is an effort to change any part of it. If there is an effort to examine the Communications Act as a whole in the future, this topic should be included.

Question:

If the DC Circuit were to VACATE or to order the Commission to revise its [net neutrality] rules substantially, how might that affect parties' abilities to negotiate retransmission consent agreements in good faith and at arms-length?

Answer:

It might affect the timing of a resolution of an ongoing negotiation while the parties tried to analyze the implications of the decision.

Substantively, retransmission consent involves the MVPD carriage of broadcast video. Net neutrality, when the discussion is focused on video, pertains to video received via the Internet, sometimes referred to as "over the top" video, which is not subject to the RTC rules and regulations. Therefore, I believe there should be no direct impact on RTC negotiations if the net neutrality rules are remanded to the FCC for further work.

Question:

Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?

Answer:

The reversal of an existing policy always introduces an element of uncertainty. Uncertainty does not support investment or creative experimentation. I believe consumers could be hurt as a result.

It should be remembered that there have been virtually no formal, public complaints about network operations under the existing net neutrality policy, which is not surprising given the vigorous competition for consumers' broadband business by the telephone and cable companies in almost all markets. Many members of the public may well wonder why a change is necessary.

Question:

Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.

I know the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts' interpretations of federal communications and copyright law is more defensible?

Answer:

I am not a practicing lawyer, so I will let those more qualified argue which decision is a better legal conclusion.

From a public policy perspective, I believe the Second Circuit decision is far better for consumers. Aereo, Inc. has fashioned a service to deliver broadcast television programming that was cleverly designed to fit in a crevice formed by the interaction of copyright law and the Communications Act (not to mention the old Sony Betamax case). Viewed from the consumer's perspective, the business model gives each customer her own DVR-like functionality to use as she wishes to consume local video products. Each technical component of the Aereo system is dedicated to only one consumer each time the consumer logs on the service just like a home DVR. I believe this viewpoint, sort of a bottoms up analysis, fits nicely under the Second Circuit opinion.

The DC Circuit, on the other hand, seems to support the viewpoint of the broadcast owners. They look at the Aereo service from the top down as a business structure solely designed to

sidestep traditional distribution methods. Since the consumer occupies the bottom of the distribution chain in the facts of the case, the DC decision is not a favorable one for the end user in my opinion.

Question:

If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.

Answer:

I am not a practicing lawyer, so I will let those more qualified opine as to the better decision.

Question:

Mr. Munson pointed out in his testimony that added regulations on broadcasters stem from what some have characterized as a social contract between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers.

Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend Report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Not withstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.

Do any of you challenge or take issue with the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?

Answer:

I do not. Moreover, I have no reason to believe that minority owners would not be as responsive to the needs of all their viewers, regardless of their characteristics.

As discussed further below, I believe that creating an environment that would foster investment in minority owned broadcast stations is important because it will make it more likely that a wider divergence in viewpoints is made available to the public.

Question:

Other than the reinstitution of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of

minority viewers and consumers gets carried over the public airwaves, using public rights-of-way?

Answer:

I believe that the more robust an investment environment we create, the greater the opportunity for new voices we create. Money will flow toward new content producers more easily if the overall investment environment in the industry is viewed as safe from regulatory uncertainty and is viewed as growing new audiences. Audience growth may come from the nature of the new content or from the new devices being used by the new customers. New devices often encourage users to seek some content forms over others, often at the expense of traditional offerings. For instance, shorter program lengths and content designed to be viewed easily on small screens has created opportunities for new speakers, including minority group members.

Question:

Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.

Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiations over retransmission consent agreements?

Answer:

I believe the reference to sensitive pricing information relates to the requirement that a broadcaster's political file contain pricing information that enables legally qualified candidates to assess whether they are getting the lowest unit rate. If so, it obviously has nothing to do with RTC.

The idea, however, of placing RTC agreements in the public files of TV broadcast stations is a good one, including the pricing information. Multiple station owners have been quite open about the fact that RTC renewal cycles start with smaller cable operators who have a weak market position and end up paying more per customer than larger operators, including satellite providers. The price achieved in the smaller markets sets the baseline for later negotiations with larger MSOs who have greater market power.

Since smaller operators own systems in small markets, the result is that consumers in small towns pay significantly more for a broadcast station than viewers in larger markets. A public record of this uneven application of a government created fee might engender discussion about establishing a more even negotiating platform. It would certainly shed light on how free a TV broadcast signal is under the RTC regime.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives
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December 20, 2013

Mr. James Campbell
Vice President of Regulatory and Legislative Affairs, Midwest Region
CenturyLink, Inc.
1099 New York Avenue, N.W., Suite 250
Washington, D.C. 20001

Dear Mr. Campbell:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, September 11, 2013, to testify at the hearing entitled "Innovation Versus Regulation in the Video Marketplace."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on January 14, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

The Honorable Bobby Rush

Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, "multichannel video programming distributor" (MVPD) in the Communications Act?

CenturyLink welcomes a comprehensive conversation about updating our nation's video laws in order to reflect the 21st Century marketplace in which we live today. We look forward to working with Congress to overhaul the twenty-year old video statute in order to help consumers realize the benefits of today's existing robust marketplace, one that did not exist when the law was enacted back in 1992.

As many of you know, the DC Circuit Court of Appeals heard oral arguments this week in the case of Verizon vs. FCC, which challenges the Commission's authority under the Communications Act to promulgate "so-called" net neutrality rules.

If the DC Circuit were to vacate or to order the Commission to revise its rules substantially, how might that affect parties' abilities to negotiate retransmission consent agreements "in good faith" and at arm's length?

Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?

We do not anticipate that the DC Circuit decision in Verizon v. FCC (regarding the Open Internet order) will have a direct impact on parties' abilities to negotiate retransmission consent agreements. As such, we do not anticipate additional impacts on retransmission consent-related business uncertainties that could impact consumers.

Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.

I know that the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts' interpretations of federal communications and copyright law is more defensible?

If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.

CenturyLink has not participated in the DC Circuit, Second Circuit or other proceedings regarding whether emerging video networks can retransmit over-the-air broadcast content, and has not taken a position on the merits of the courts' interpretations of copyright laws.

Mr. Munson pointed out in his testimony that added regulations on broadcasters "stem from what some have characterized as a 'social contract' between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers."

Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend Report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast only homes. Additionally, minorities comprise 41 percent. Notwithstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.

Do any of you challenge or take issue with the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?

Other than the reinstitution of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of minority viewers and consumers gets carried over the public airwaves, using public rights-of-way?

CenturyLink strongly supports program diversity and is proud of the breadth and collection of diverse offerings that it makes available to its consumers. We recognize the changing demographics of the country and thus distinguish ourselves in the video marketplace through a diverse selection of programming intended to meet the needs of all viewers. As we begin our participation in the Committee's Communications Act update process, we look forward to working with your office and other committee members on programming diversity issues.

Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.

Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiation over retransmission consent agreements?

Greater transparency in how a publicly-licensed broadcast station determines its pricing, terms and conditions for fair and reasonable access to its programming could aid more rational and predictable retransmission consent costs for video programming distributors. This in turn could benefit consumers through greater stability of MVPD video service offerings and pricing.

However, to the extent Mr. Munson's reference to sensitive pricing information refers to advertising rates contained in public inspection files, we do not perceive a connection to the retransmission consent negotiation process.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

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Minority (202) 225–3641

December 20, 2013

Mr. John Bergmayer
Senior Staff Attorney
Public Knowledge
1818 N. Street, N.W., Suite 410
Washington, D.C. 20036

Dear Mr. Bergmayer:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, September 11, 2013, to testify at the hearing entitled "Innovation Versus Regulation in the Video Marketplace."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on January 14, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Response to questions from The Honorable Bobby Rush by John Bergmayer, Senior Staff Attorney at Public Knowledge

January 14, 2014

1. Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, "multichannel _video programming distributor" (MVPD) in the Communications Act?

There are several ways that Congress could consider revisiting the regulatory category of "multichannel video programming distributor" (MVPD). The most obvious would be for policymakers to clarify that this is a technology-neutral term that does not depend on last-mile facilities ownership.

Congress has already adopted a technology-neutral definition of multichannel video programming distributor. Section 602(13) of the Communications Act defines one as,

> a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

I believe this broad definition encompasses any distributor of channels of "video programming" as defined by the Act--which would mean that a "virtual cable system" like Sky Angel would qualify, but a provider of on-demand or downloadable programming (such as Netflix or iTunes) would not. For the Subcommittee's reference, I am attaching a more detailed legal analysis of this point that Public Knowledge has previously filed with the FCC. In short, however, I see no evidence that Congress intended the term to encompass only technologies in existence at the time of the provision's adoption, or that it should be restricted to providers that own last-mile physical facilities.

However, I am aware that not all in the Commission or the Communications bar more generally agree with this interpretation. I would therefore support legislatively clarifying that the term encompasses all technologies, including online video.

Longer term, Congress may wish to revisit the practice of distinguishing between video providers that offer "channels" and those that do not. However, such a change would be more appropriate after more competition has developed in the video market. Premature action in this regard could solidify the market position of current MVPD incumbents and harm online competition.

As many of you know, the DC Circuit Court of Appeals heard oral arguments this week in the case of Verizon vs. FCC, which challenges the Commission's authority under the Communications Act to promulgate "so-called" net neutrality rules.

If the DC Circuit were to VACATE or to order the Commission to revise its rules substantially, how might that affect parties' abilities to negotiate retransmission consent agreements "in good faith" and at arms-length?

If the DC Circuit were to vacate the Open Internet rules, I do not think there would be many direct effects on retransmission negotiations. However, an open Internet is necessary to protect online video competition. The existence of online video providers can affect carriage negotiations, since they serve both as alternate providers for consumers, alternate sources of programming, and alternate distributors.

2. Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?

There would be business uncertainties that harmed consumers if the DC Circuit vacates the Open Internet order--in particular, investment in online video ventures may be lessened.

Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.

3. I know that the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts' interpretations of federal communications and copyright law is more defensible?

4. If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.

Public Knowledge has filed amicus briefs in various cases arguing that Aereo and like services should prevail on the merits. With regard to the Aereo and FilmOn Cases, the Second Circuit's analysis is more sound, because it preserves the distinction between "public" and "private" performances. Every day, people access content over the Internet that they have lawfully paid for via cloud storage and other services. It should be clear that a person accessing his own content on a cloud service is not engaging in a performance, and that a cloud service is not "publicly performing" a copyrighted work simply by allowing a user to store and access her

own content. However, under the DC Circuit's reasoning, it is unclear whether many existing online business models are somehow engaging in public performances of various works, simply by providing basic storage and access functions. Parties on the other side of this dispute have not put forth a convincing case that their legal position would not have consequences for online businesses that extend beyond the specialized fact pattern of online antenna rental services.

Mr. Munson pointed out in his testimony that added regulations on broadcasters "stem from what some have characterized as a 'social contract' between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers."

Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend Report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Notwithstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.

5. Do any of you challenge or take issue with the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?

I agree that the best way to ensure that the media remain responsive to minority needs and interests is to promote and preserve minority ownership of media--minorities should write, produce, broadcast, and distribute video programming, and minorities should own companies and facilities at every link in this chain. Ensuring that media meets the needs of all members of the community is an important component of the public interest.

6. Other than the reinstitution of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of minority viewers and consumers gets carried over the public airwaves, using public rights-of way?

The FCC and other policymakers have an obligation to ensure that media companies that use the public airwaves or public rights-of-way are serving the public interest. If media companies are not, I believe policymakers should be more ready than they have been in the past to deny them access to these public assets.

Going forward, I also believe that policymakers should encourage minorities to bypass traditional gatekeepers and produce their own content and distribute it online, while protecting their ability to reach viewers by promoting Internet openness, ensuring that data caps do not discourage the emergence of the Internet as a primary video distribution platform, and ensuring universal access to adequate broadband.

Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.

7. Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiation over retransmission consent agreements?

The best way to promote good-faith negotiation (apart from the FCC's adoption of a few key per se bad faith rules) would be binding, baseball-style arbitration. In this style of arbitration, each party makes its best offer, and the arbitrator chooses the fairest of the two offers. This encourages each side to make its offer as fair as possible from the beginning and discourages extreme starting negotiating positions. Arbitrators should generally have access to whatever information they need to make a fair assessment.

Certainly, if MVPDs make more information public, this might aid negotiations, as well. While I would hesitate to say that MVPDs should have the exact same disclosure requirements as broadcasters--the public interest calculus for the different types of entity is simply different--I also think that consumers would benefit from knowing where their cable bills are going. Indeed, some MVPDs might welcome certain disclosure requirements, as they can be prohibited from disclosing the terms of carriage deals by contract.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
Interpretation of the terms	)	MB Docket No. 12-83
"Multichannel Video Programming	)	
Distributor" and "Channel" as Raised	)	
in Pending Program Access	)	
Complaint Proceeding	)	
	)	

COMMENTS OF PUBLIC KNOWLEDGE

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May 14, 2012

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

The Commission should clarify that online video providers such as Sky Angel are "multichannel video programming distributors" (MVPDs). Only a technology-neutral reading of the term is consistent with the text and purpose of the Communications Act.[1] This action will not redefine all online video platforms as MVPDs. Nor will it define any online video system as a cable system.[2] Rather, only those MVPDs that closely emulate traditional, channel-based MVPDs will be affected. To implement this, the Commission will have to slightly modify a few of its regulations. But this reading is consistent with the technologically-neutral approach Congress has taken to video competition since the Cable Television Consumer Protection and Competition Act of 1992, and as such, no statute stands in the way of this pro-consumer, pro-competitive understanding of the law.

Additionally, the Commission should find that Section 628 of the Communications Act prohibits anti-competitive actions by any MVPD against any video programming distributor, multichannel or not. There is no sound policy reason for the Commission to prohibit anti-competitive actions by one MVPD against another MVPD, but not by an MVPD against a non-MVPD video programming distributor.

Finally, the Commission should issue a further notice of inquiry in this docket that seeks comment on a comprehensive policy framework for non-multichannel

[1] For example, the Commission is charged with promoting an "efficient" communications system. 47 U.S.C. § 151. The goal of "efficiency" would not be well-served if the Bureau makes distinctions between like systems based only on irrelevant technical implementation details.

[2] For Communications Act purposes. Whether a system is a "cable system" for copyright purposes is another matter. *See* 17 USC § 111.

video. While on-demand content is "video programming" under the Act, it is not channel-based. But it is clear that the market is moving increasingly toward on-demand video, and the Commission should seek to understand the competitive effects that this transition may cause.

I. The Term "Multichannel Video Programming Distributor" Encompasses All Platforms That Make Available Prescheduled "Video Programming"

Any provider that makes available multiple channels of video programming is a "multichannel video programming distributor" ("MVPD"). While distributors like Sky Angel indisputably offer "video programming," the Bureau has asked whether online services offer "channels" of video programming. As used in the Cable Television Consumer Protection and Competition Act of 1992, a "channel" is a stream of signal of prescheduled video programming. Since an online distributor like Sky Angel offers "channels" in this sense just as DirectTV or Time Warner Cable do, such distributors meet the definition of MVPD.

A. Principles of Statutory Construction Demand That The Commission Take Account of Context When Interpreting a Statute

The word "channel" is used in different ways in the Communications Act. In a video context, the Act uses the term both in a "container" sense, to refer to a range of frequencies used to transmit programming, and in a "content" sense to refer to the programming itself, or the programmer. This figure of speech is known as synecdoche, and it pervades the language. "When we say 'the kettle is boiling' we do not mean that the metal container (the kettle) has become a lump of molten metal;

we mean that the contents of the kettle (the water in it) has boiled."[3] Thus when the term is used in the Act it is necessary to read the word in either the "container" sense, or in the "contents" sense, as context demands.

There is nothing unusual about reading a statutory term different ways in different contexts. While there is an interpretive presumption that a term that appears several times in a statute is given the same reading each time,[4] the Supreme Court has explained that this presumption "readily yields" and that "[i]t is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance."[5] As the Court further explained,

> Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.[6]

Commission practice confirms that the same word can be given a different construction when it is used by different acts. For example, the Commission interprets the word "telecommunications" to mean one thing under the Telecommunications Act, and another thing under the Communications Assistance

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[3] CHRISTOPHER KELEN, AN INTRODUCTION TO RHETORICAL TERMS 28 (Humanities-Ebooks 2007).
[4] *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)
[5] *Atlantic Cleaners & Dyers. v. United States*, 286 US 427, 433-34 (1932)
[6] *Id.* at 433.

for Law Enforcement Act.[7] As the DC Circuit recognized, it is well within the Commission's authority to give words different constructions from one act to another when the different laws evince "different texts, structures, legislative histories, and purposes."[8] Similarly, the word "channel" means one thing when used as part of the Cable Communications Act of 1984[9] ("1984 Cable Act") and another thing when used as part of the definition of multichannel video programming distributor ("MVPD") in the Cable Television Consumer Protection and Competition Act of 1992[10] ("1992 Cable Act"). In particular, the word "channel" in the 1992 Cable Act should be given a "content" reading, since only that reading is consistent with the Act's pro-competitive purposes.

B. Other Provisions of the Law, Commission Practice, and Common Usage All Demonstrate That the Term "Channel" Has Both a "Container" and a "Contents" Sense

According to the 1984 Cable Act, "the term 'cable channel' or 'channel' means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)." In the *Sky Angel Standstill Denial*[11] the Bureau used this definition to find that Sky Angel is not a "multichannel video programming distributor" (MVPD), since an MVPD "makes available for purchase...multiple channels of video programming."[12] The Bureau reasoned that

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[7] *See American Council on Educ. v. FCC*, 451 F. 3d 226, 230 (DC Cir. 2006).
[8] *Id.* at 231.
[9] PL 98-549, 98 Stat. 2779 (1984).
[10] PL 102-385, 106 Stat. 1460 (1992).
[11] Sky Angel Emergency Petition for Temporary Standstill, *Order*, 25 FCC Rcd. 3879 (MB 2010).
[12] 47 USC § 522(13).

Sky Angel does not make available for purchase any "channels" since the electromagnetic frequency spectrum that its video programming uses for transmission is provided by a viewer's broadband ISP and not by Sky Angel.[13]

This construction's primary flaw is that it ignores the relevant context. The term "MVPD" was adopted as part of the 1992 Cable Act, not the 1984 Cable Act. As will be discussed below, the 1992 Cable Act was concerned with promoting inter-platform competition and (contrary to the Bureau's conclusion) not all of systems listed in the statute as illustrative of MVPDs provide a transmission path. But it is important to note that *even the 1984 Cable Act's definition* uses both senses of the term "channel" (the container sense and the contents sense) when it speaks of one kind of channel carrying another kind of channel. This demonstrates that the drafters of the 1984 Cable Act saw a channel as both a medium of communication (in this case, the frequency which a communication may use) and the content of a communication itself (a television station, or television channel). Otherwise, the statute would be incoherent. Used only in the "container" sense, one channel cannot "deliver" another. A channel can be used to retransmit content, but one portion of the electromagnetic frequency spectrum cannot be used to "deliver" another portion of the electromagnetic frequency spectrum. A channel can only deliver programming. Thus the 1984 Cable Act's definition of "channel" itself uses the term "channel" in both the "delivery" sense and the "content" sense.

The Commission frequently uses the term in both senses, as well. For example, in its recent NPRM on revision of the program access rules, it wrote that "consumers

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[13] *Sky Angel Standstill Denial* at ¶ 4.

do not consider the SD version of a particular channel to be an adequate substitute for the HD version."[14] The word "channel" in this context makes no sense if it means "a portion of the electromagnetic frequency spectrum." There is no "HD" or "SD" version of a particular frequency band; rather, particular frequency bands can carry content that is in either HD or SD. Similarly the Commission, in discussing the Comcast Network, wrote that "this terrestrially delivered, Comcast-affiliated local news and information channel is available only to Comcast and Cablevision subscribers and is withheld from competitors to incumbent cable operators."[15] Here again the Commission uses the term to refer to content and not to a frequency band. And in its Comcast/NBCU conditions order, while the Commission declined to resolve whether an online video distributor (OVD) could be an MVPD,[16] it discussed how "the fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future."[17] Thus the Commission has already acknowledged that no technical barrier stands in the way of online services providing "channels" of programming to their customers. Generally speaking it is clear from context whether the Commission (or Congress) is using "channel" in a content or a container sense, and in those cases

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[14] Revision of the Commission's Program Access Rules, *Notice of Proposed Rulemaking*, MB Docket No. 12-68, FCC 12-30 (Mar. 20, 2012) at ¶ 54. *See also* Program Access Rules & Examination of Programming Tying Arrangements, *First Report & Order*, 25 FCC Rcd. 746, ¶ 55 (2010).
[15] Program Access Rules & Examination of Programming Tying Arrangements, *First Report & Order*, 25 FCC Rcd. 746, ¶ 30 (2010).
[16] Applications of Comcast Corp., GE Co. & NBC Universal, Inc., *Memorandum Opinion & Order*, 26 FCC Rcd. 4238 (2011) at ¶ 61 n.131.
[17] *Id.* ¶ 80.

where there may be ambiguity, qualifying words (such as "channel capacity"[18]) provide the necessary disambiguation. In the case of the definition of MVPD in the 1992 Cable Act, as will be discussed below, it is clear from the context and purpose of the law that a "channel" is intended to be given a service-based, not a technology-based reading.

Two popular reference works will conclude the demonstration that the word "channel" in a television context frequently is used in two different senses. First, the Oxford English Dictionary defines channel as "[a] band of frequencies of sufficient width for the transmission of a radio or television signal; *spec.* a television service using such a band," providing both senses of the word.[19] Second, Wikipedia, with an ethos very different from the OED, similarly provides both senses. It writes that "[i]n broadcasting, a channel is a range of frequencies (or, equivalently, wavelengths) assigned by a government for the operation of a particular radio station, television station or television channel," providing the "container" sense of the word. But it concludes with the content sense, explaining that "[i]n common usage, the term also may be used to refer to the station operating on a particular frequency."[20]

While the different ways that the 1984 Cable Act, the Commission, or anyone or anything else uses the term does not determine how the 1992 Cable Act uses the term, it is instructive to observe these different senses since they illustrate the

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[18] *See* Internet Ventures Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities, *Memorandum Opinion & Order*, 15 FCC Rcd. 3247 (2000).

[19] Oxford English Dictionary Online Edition, http://www.oed.com (accessed May 2, 2012).

[20] Channel (broadcasting), http://en.wikipedia.org/w/index.php?title=Channel_(broadcasting)&oldid=442911630 (last visited May 2, 2012; last edited Aug. 3, 2011).

different meanings the word can have in different contexts. In sections below it will be shown how the word "channel" when read in the context of the 1992 Cable Act must be given a "content" reading, both to make sense of the statutory context and to give effect to Congress's pro-competitive intent.

C. The 1992 Cable Act Uses "Channel" To Mean "Prescheduled Video Programming"

The 1992 Cable Act gives the following definition of "multichannel video programming distributor":

> the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming[.][21]

A plain reading of this definition demonstrates that MVPDs are characterized by what they do, not how they do it. *All* providers who "make[] available for purchase, by subscribers or customers, multiple channels of video programming" qualify. As the FCC has previously found, the plain language of this definition does not require that an MVPD "operate [its] vehicle for distribution."[22] Indeed, in the Telecommunications Act of 1996 Congress demonstrated that an MVPD need not be facilities-based when it mentioned that an MVPD might "use the facilities" of another provider.[23] This shows that the last time it considered this issue, and consistent with the 1992 Cable Act, Congress found that "MVPD" was a service-oriented category

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[21] 47 U.S.C. § 522(13).
[22] Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, *Third Report & Order & Second Order on Reconsideration*, 11 FCC Rcd. 20227, ¶ 171 (1996).
[23] 47 U.S.C. § 543(l)(1)(D) (discussing a "multichannel video programming distributor using the facilities of [a] carrier or its affiliate").

and not a technological silo. The law does not require that an MVPD build or operate last-mile wired facilities, launch a satellite, or use any particular technology or method of program delivery.

To further clarify this, Congress provided in its definition a list of every then-existing multichannel service ("a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor") while expressly reserving that the list was not intended to be exhaustive ("a person such as, but not limited to.") This demonstrates that Congress intended the definition to encompass technologies that, at the time, had not yet been developed.

In its *Sky Angel Standstill Denial* the Bureau took note of this but reasoned that, because the definition states that an MVPD must be a system "such as" the ones expressly listed, to be an MVPD a system must share characteristics with the ones given.[24] Of course, any MVPD must, like the listed MVPDs and consistent with the definition, provide multiple channels of video programming to subscribers. This provides the necessary commonality between the listed services. But the Bureau further reasoned that each listed MVPD provides a "transmission path" it uses to deliver video programming.[25] (This reasoning informed its narrow construction of "channel," discussed below.) In addition to contradicting FCC precedent, this analysis if flawed for at least three reasons.

First, while it may be that a cable system or a telco MVPD "provides" a transmission path in the sense that they physically string copper wires or fiber optic

[24] *Sky Angel Standstill Denial* at ¶ 7 n.41.
[25] *Id.* at ¶ 7.

cable, wireless systems like DBS and MMDS do not similarly "provide" a transmission paths. They use licensed spectrum to transmit information like any other wireless services. They did not build this spectrum and do not "provide" it.

Second, even if the Bureau decides that wireless systems do "provide" (or "make available") a transmission path, it is not clear that online systems do not provide transmission paths in the same way. For example, an online video distributor might enter into a relationship whereby it leases and resells last-mile broadband capacity.[26] And even a traditional cable system does not necessarily provide a complete transmission path to a viewer's television: the viewer herself or a landlord might provide inside wiring, for instance. Given this background, since online services generally own or lease some facilities (such as servers) and "transmit" programming partly on their own Internet connections, they "provide" transmission paths in the same sense as other MVPDs.

Third, it is the wrong question. Nothing in the text or legislative history of the Act suggests that Congress intended to hide an unstated requirement that MVPDs must be facilities-based. Thus analyzing whether or not particular video platform is or is not facilities-based and whether or not it provides a transmission path is an unnecessary diversion. It is clear from context that as part of the definition of MVPD "channel" should be given a "contents" reading. Questions about the nature of the facilities an MVPD uses are thus inapposite. Consumers do not purchase "a portion

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[26] *See* Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, *Third Report & Order & Second Order on Reconsideration*, 11 FCC Rcd. 20227, ¶ 171 (1996). Furthermore, it is well-established that a "facilities-based" provider may be a reseller. *See, e.g.*, Flying J Petition for Expedited Declaratory Ruling, *Memorandum Opinion & Order*, 18 FCC Rcd. 10311 (2003).

of the electromagnetic spectrum" when they subscribe to an MVPD. They buy access to content—in particular, to channels like NBC, ESPN, and Comedy Central. An MVPD like Comcast even distinguishes its various TV plans as offering different levels of "on demand" and access to different numbers of "channels."[27] The channels in question are given names like "MTV" and "Discovery," not like "549.25 MHz." This demonstrates that what matters to everyone concerned is the content, not the precise carrier.

This practice is consistent with the statute, which makes clear that consumers buy access to "video programming" in two primary ways: on-demand, and via prescheduled channels. The law distinguishes these two services when it provides that

> the term 'interactive on-demand services' means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider[.][28]

On-demand and prescheduled programming thus represent different models of presenting "video programming." By defining a kind of service ("interactive on-demand service") that is distinct from MVPDs, and by providing that video common carriers that offer only interactive on-demand services would not be considered "cable systems" (one kind of MVPD)[29] Congress drew a line between providers of prescheduled video programming on the one hand, and providers of on-demand video programming on the other. Since on-demand video programmers are *not*

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[27] *See*, for example, Comcast's overview at http://comcast.com/Corporate/Learn/DigitalCable/digitalcable.html (last accessed May 10, 2012).
[28] 47 U.S.C. § 522(12).
[29] 47 U.S.C. § 522(7)(C).

cable systems and are therefore not MVPDs, it follows that a provider of prescheduled video programming *is* an MVPD. Thus, for the purposes of the 1992 Cable Act, a "channel" of video programming must simply mean "prescheduled video programming," or a provider of such programming.[30]

"Channels" and "on-demand" are both *services*, not technological delivery methods. The overall statutory scheme would fail if a "channel" were found to be a transmission method while "on-demand" remained a service. As will be discussed more fully below, under this reading, there is no reason why an on-demand service could not be delivered via a channel. Only a reading that understands that both of these terms refer to mutually exclusive services prevents such commingling.

D. The Legislative History of the 1992 Cable Act Confirms That "MVPD" Is a Technology-Neutral Category

The 1984 Cable Act was "was premised on the expectation that emerging competition in the video marketplace would result in reasonable rates for cable service and improved customer services practices."[31] However, after its passage "competition to cable from alternative multichannel video technologies largely ... failed to materialize."[32] Business and regulatory barriers stood in the way of competition, and consumers suffered.

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[30] While an MVPD becomes one by virtue of delivering channels of video programming, video programming it offers via any means (including on demand) may be subject to special requirements. For example, video programming offered on-demand by an MVPD is subject to program access rules while on-demand programming offered by a non-MVPD would not be. *See* Applications of Comcast Corp., GE Co. & NBC Universal, Inc., *Memorandum Opinion & Order*, 26 FCC Rcd. 4238 (2011) at ¶ 54 n.122.

[31] H.R. Rep. No. 102-628 (1992) at 26.

[32] *Id.*

In response, Congress enacted the 1992 Cable Act. In that Act, rather than simply regulating monopolist cable systems, Congress enacted a series of measures designed to promote consumer welfare by enabling competition to cable from systems that used different transmission methods. Rather than regulating each different system differently according to its technology, Congress created a new service category, "multichannel video programming distributors" (MVPDs), along with a framework that treated all MVPDs alike. Thus, the program access and retransmission consent systems that were central components of the 1992 Cable Act apply to all MVPDs, not just to cable or just to satellite TV. Of course, where there are good reasons to treat different classes of MVPDs differently Congress continues to do so. But the future-proof laws that concern MVPDs generally were specifically designed to be technology-neutral and can apply to online MVPDs today just as, in 1992, they easily encompassed cable, direct broadcast satellite, and multichannel multipoint systems.

A "principal goal" of the 1992 Cable Act was "to encourage competition from alternative and new technologies,"[33] by extending like treatment (e.g., under the program access rules, and for retransmission consent purposes) to like services.[34] This would enable competition rather than regulation to protect consumers. The House found that "competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the

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[33] *Id.* at 27.

[34] 1992 Cable Act, PL 102-385, 106 Stat. 1460 at 1482 (retransmission consent applies to all multichannel video program distributors), 1494 (some MVPDs are prohibited from taking anti-competitive actions against any MVPD).

development of a competitive marketplace to regulation."[35] (It also found that "until true competition develops, some tough yet fair and flexible regulatory measures are needed."[36]) Along these lines, the Senate found that "[e]ffective competition is achieved when there is competition from both another 'multichannel provider' (such as a competing cable operator, microwave or satellite system) and a sufficient number of over-the-air broadcast signals"[37]—thus recognizing the need for broad, multi-platform competition between video providers without regard to their specific modes of operation.

The fact that online MVPDs were not yet possible when Congress passed the 1992 Cable Act is of no importance. To be sure, Congress enacted the 1992 Cable Act in response to conditions that were prevalent in 1992.[38] But in defining MVPDs it used broad language, and "[t]he use of broad language ... to solve [a] relatively specific problem ... militates strongly in favor of giving [a statute] broad application."[39] In any event the problem that it sought to solve—consumer harms caused by a lack of sufficient competition—persists today. And the solution is the same: a service-oriented approach to the video market that permits MVPDs using any technology to compete with established cable systems.

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[35] H.R. Rep. No. 102-628 (1992) at 30.
[36] *Id.*
[37] S. Rep. No. 102-92 (1992) at 63.
[38] The legislative history's reference to "facilities-based" competition should be read in this light. *See* H.R. Rep. No. 102-862 at 993 (1992). In 1992 the main competition to cable that could be foreseen was facilities-based. However, given the broad language of the Act, the pro-competitive policies that Congress enacted should not be confined to particular kinds of technology.
[39] *Consumer Electronics Ass'n* v. FCC, 347 F. 3d 291 (D.C. Cir 2003).

Given the pro-competitive, technology-agnostic approach evinced in the statute and the legislative history it is clear that Congress intended "MVPD" to be a service category, not a technological silo. If it intended to require that MVPDs be facilities-based it could have easily said so in the statute. It is unlikely that it would have enacted such a requirement through the circuitous means of incorporating in its definition one of the possible senses (the "container" sense) of the word "channel."[40] Thus, the Bureau should revise the construction of "channel" as contained in the definition of MVPD that it adopted in the *Sky Angel Standstill Denial* to reflect Congress's technology-neutral intent.

E. A Narrow Reading of "Channel" Would Have Unintended Consequences

Unless the Bureau revises the restrictive definition of "channel" it adopted in the *Sky Angel Standstill Denial*, numerous unintended consequences will follow. These go beyond the anti-competitive and anti-consumer effects that would be expected to follow from artificially restricting market entry. Instead the Bureau may find that many "channels" that are currently offered by MVPDs are not channels at all anymore—or it may find that other services offered by MVPDs, such as interactive apps or on-demand programming are suddenly defined as "channels," based only on the behind-the-scenes technical characteristics of the way that the content is delivered.

For example, if the Bureau continues to hold that an MVPD must provide its subscribers with a transmission path, then any programming that is delivered without a fixed transmission path may become ineligible. IP-based MVPDs such as

[40] *See Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

U-Verse that may not assign particular programming networks particular frequencies may not provide any "channels" at all if "channel" is defined in this way. Switched digital networks on cable systems may no longer count as "channels" since they are not continually broadcast on a fixed "portion of the electromagnetic frequency spectrum." And any MVPD would simply be able to spin off its facilities into a separate affiliate and then lease them back in order to avoid MVPD regulation. At the same time, if an MVPD provides its video-on-demand or other services on particular bands of frequencies, then these services would be considered "channels" under the Commission's rules. **There is *nothing* in the definition of "channel" as adopted by the *Sky Angel Standstill Denial* that would exclude on-demand services.** As was mentioned above, because "on-demand" is a kind of service, if "channel" refers to a means of delivery then on-demand video programming could very well be delivered via a "channel." By contrast, a service-based reading of "channel" precludes this. For the purposes of defining an MVPD, only a service-based reading of the term "channel" that refers to a prescheduled transmission of video programming is sufficient to both 1) ensure that traditional "channels" continue to be considered "channels" under the Commission's rules, and 2) ensure that *only* traditional channels are considered "channels" under the Commission's rules.

Needless to say such shifting categories would wreak havoc with the Commission's ability to oversee the MVPD market—existing programming may fall outside the program access rules while other services come within them, and MVPDs would have an incentive to engineer their systems inefficiently just to

qualify for, or fall outside of, particular rules. The Commission has seen ample evidence of exactly this kind of behavior—MVPDs have continually tried to skate around FCC and Congressional policy by delivering programming via terrestrial wires instead of satellite, providing only the standard definition and not the high definition versions of feeds to competitors, and so forth. It does not require much imagination to see how a cable system might stop providing some programming to a DBS competitor by claiming that this programming no longer counted as a "channel" under the Commission's rules since it is not offered over an assigned transmission path.

F. Many Policy Benefits Would Follow From the Bureau's Clarification That Online Services Can Choose to Compete as MVPDs

1. Consumers Would Benefit

By clarifying that an online system can qualify as an MVPD, the Bureau will significantly benefit consumers. A typical viewer will go from having a choice of one or two MVPDs to any number of them. Just as a reader today is no longer limited to the local newspaper and one or two national papers, but can read online news from around the country and around the world, by clarifying that online systems can qualify as MVPDs, the Bureau will make it so that viewers can choose from between a large number of competitive MVPDs instead of being limited to the same few options, year after year.

2. Independent Programmers Would Benefit

Independent programmers will benefit, as well. Today an independent programmer has no choice but to deal with a handful of large programming distributors, on terms the distributors set. While the program access rules prevent

an MVPD from keeping a programmer from being carried by other current MVPDs, nothing at the moment prevents a company like Comcast demanding, as a condition for being carried on Comcast, that the programmer stay off of online platforms. With its clarification the Commission will fix that by extending the same protection that programmers enjoy with respect to current competitive MVPDs to online MVPDs. This will ensure that programmers can bid distributors against each other, extract more favorable terms, and extend the reach of their programs.

3. All Online Video Distributors Would Benefit, Even Ones That Are Not MVPDs

Non-MVPD online programmers will benefit from the FCC's clarification, as well. Many online video platforms like Netflix and Vimeo have chosen business models that take them outside the meaning of "MVPD." These new models of video distribution have been a boon to both viewers and content creators, but they are not full substitutes for traditional MVPD service. They usually lack "must-see" programming such as current TV shows, live sports, and popular cable networks. While many viewers have "cut the cord" (cancelled their MVPD subscription) and replicated much of what they might have watched through free over-the-air broadcast TV and mixing and matching online services, this is generally an imperfect substitute that does not offer all of the programming available through a traditional MVPD—and is technologically complex (and somewhat cumbersome) besides. But if more viewers were able to access *all* of the programming they currently access through a traditional MVPD subscription online, more consumers might be able to switch completely to competitive offerings. For example, a given viewer might not have an Amazon Instant Video subscription today, since she finds

cable programming indispensable and, on-balance, finds that cable on-demand video is good enough to not justify subscribing to an online service. But if online MVPDs were allowed to thrive consumers might be able to efficiently mix and match, obtaining on-demand video from one source and traditional network and cable channels from another source. So if a viewer were able to subscribe to an online MVPD and access the indispensable programming that currently keeps her tied to cable, she might find that Amazon Instant Video serves well as the on-demand component of her viewing. Online MVPDs would therefore benefit non-MVPD video distributors by allowing viewers to fill in the gaps and obtain the programming that the non-MVPDs cannot or do not provide, which makes viewers more likely to switch to competitive online offerings.

Additionally, it is likely that in a world with online MVPDs, non-MVPD online video program distributors might be able to access programming they are currently shut out from. Currently, facilities-based MVPDs seek out and obtain some measure of exclusivity, which can limit online distribution. But if online MVPDs had the same access to programming as facilities-based MVPDs then that exclusivity would be impossible. There would thus be no reason for an MVPD to keep programming off of non-MVPD platforms such as iTunes or Netflix.

4. Device Makers and Their Customers Would Benefit

A rise in the number of cord-cutters would also benefit companies that make devices and services that facilitate online viewing, such as Boxee, Roku, Hauppage, and many others. Today a viewer might not be willing to invest in a device that makes online video as easy or easier to watch than traditional MVPD video, since it

would be an additional box, taking up space next to a cable set-top box and being yet another gizmo to set up, configure, and maintain. But if a viewer could use such a device to watch every kind of content it is more likely that they would be willing to cut the cord and invest in such a device. This would have a number of positive effects.

Currently MVPD viewers are, for the most part, stuck using MVPD-provided devices to navigate and watch TV. Compared with the competitive markets in smartphones, tablets, computers, and other areas of consumer electronics these devices have bad user interfaces, few features, and are generally poor. This is simply because a lack of competitive pressure eliminates the incentive for the companies that provide these devices to innovate. MVPDs buy these devices from manufacturers, not consumers, so the devices tend to reflect the MVPD priority to keep consumers watching MVPD and not online content, and not the viewer priority to have an intuitive, useful device. The consumers who are stuck using these boxes have no alternatives; they cannot simply go to the store and buy a better one. The competitive marketplace for devices that would arise in the wake of the FCC's decision to allow online MVPDs to play by the same rules as other MVPDs would improve this situation, allowing devices like the Roku and the Apple TV (which are already superior to cable set-top boxes) to begin providing all, not just some, of a viewers content. The increase utility of these devices would attract yet more companies to the market,[41] and would in turn encourage cord-cutting, which would

[41] Sony, Apple, and Intel have all been reported as being interested in entering the online MVPD market. *See* Yukari Iwatani Kane & Ethan Smith, *Apple Sees New Money in Old Media*, WALL STREET JOURNAL,

encourage new online video platforms. These virtuous cycles would benefit viewers and significantly improve video competition generally.

5. Competitive MVPDs Would Benefit

Finally, online MVPDs would also benefit current, facilities-based MVPDs in a number of ways. Currently, many MVPDs pay high rates for retransmission consent. But if an MVPD's customers were able to access broadcast content from other sources, the MVPD might simply decline to carry expensive broadcast signals, saving significantly without inconveniencing its customers (or offsetting that inconvenience with lower rates). Additionally, a more fluid MVPD market would allow current MVPDs to become online MVPDs as well, competing outside of their traditional service areas.

G. The Majority of Current Online Video Services Are Not, and Could Not Become, MVPDs Unless They Chose To

Although this should be evident from the above, it bears emphasizing that by clarifying that a "channel" can be provided online, the Bureau would not somehow transform current services like Hulu, Netflix, and iTunes into MVPDs. While they provide "video programming" within the meaning of the law, these services do not offer channels of programming—their content is typically available on demand. If the Bureau acts consistently with these comments their regulatory status would not change.

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http://online.wsj.com/article/SB10001424052748703405704575015362653644260.html (Jan. 22, 2010) (Apple); Marguerite Reardon, *Is Intel Developing an Online TV Service?*, CNET, http://news.cnet.com/8301-30686_3-57395834-266/is-intel-developing-an-online-tv-service/ (Mar. 12, 2012) (Intel); Andrew Wallenstein, *Sony Virtual MSO Play Could Hinge on Comcast*, VARIETY, http://www.variety.com/article/VR1118053341 (Apr. 30, 2012) (Sony).

However, the Bureau's action would allow any service that *chooses* to operate as an MVPD to do so. Any service that begins to offer video programming via multiple channels online would be able to benefit from the retransmission consent and program access regimes, and would, like any other MVPD, be subject to public interest obligations.[42] By adopting a proper reading of "MVPD" that includes online services the Commission will both promote new entry and competition without extending regulations to any services that do not wish to operate as MVPDs.

II. The Commission Has Discretion to Interpret the Law to Enhance Competition

A. The Commission Should Resolve Any Statutory Ambiguity in Favor of Competition

The terms "channel" and "multichannel video programming distributor" are not ambiguous. As discussed above, in the context of the 1992 Cable Act "channel" unambiguously refers to a stream of prescheduled video programming, and a multichannel video programming distributor is any provider who provides this service, such as a cable system, DBS, or an online provider such as Sky Angel.

However, if the Commission finds the statute and the legislative history insufficient to demonstrate whether an online video service can be defined as an MVPD, the Commission has the authority to make that clarification. Under the Commission's *Chevron* deference it has the authority to interpret the relevant terms

[42] To be sure a proper reading of "MVPD" or "channel" is not the end of the legal work that the Commission will have to do to accommodate online MVPDs—the Commission may have to update some of its MVPD-wide rules, such as CableCARD support, 47 C.F.R. §§ 76.1200-76.1210, and certain technical requirements, *e.g.* 47 C.F.R. § 76.610, to better ensure that Congressional intent is carried out with respect to this new technology. But such ministerial fixes are well within the Commission's authority and are a necessary part of carrying out the pro-competitive goals of the 1992 Cable Act.

and find that online services can be treated as MVPDs. Congress delegated power to the Commission to adopt the interpretation of ambiguous language that best furthers the public interest goals of the Communications Act. As the Supreme Court explained, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[43] Here, if the Commission finds that the operative definitions do not definitively answer whether online systems that offer channels of programming are MVPDs, it should use its implicit delegation of authority to clarify the terms in a way that gives effect to Congress's pro-competitive intent.

B. The Commission Can Use Its Ancillary Authority to Promote Video Distribution Competition

Furthermore, even if the Commission adopts a reading of statutory language that puts online services outside of the definition of "MVPD," it still has ancillary authority to determine that online services will be treated *as if* they were MVPDs. Congress expressly gave the Commission power "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[44] There are two conditions for ancillary jurisdiction and both are satisfied here.[45] First, the Commission's general

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[43] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).
[44] 47 U.S.C. § 154(i). *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).
[45] *See Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir 2010); *American Library Ass'n v. FCC*, 406 F.3d 889, 691-92 (D.C. Cir. 2005).

jurisdictional grant under Title I covers all "communication by wire or radio,"[46] which includes online delivery of video programming, and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities because of the close relationship between online services, broadcasting, and facilities-based MVPDs. In *Southwestern Cable*, the Supreme Court explained that the Commission did not have express authority over cable television under the then-existing Communications Act, but the Commission could regulate cable television to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[47] Just as cable television was reasonably ancillary to regulating television broadcasting, online video services are reasonably ancillary to regulating MVPDs. Therefore, the Commission has the discretion to treat online services that offer MVPD services as though they were MVPDs even in the event it chooses to read the relevant statutes in a way that excludes online services.

III. The Commission Should Update Its Policy Framework for Online and On Demand Video

A. Section 628 Prohibits Anti-Competitive Actions By an MVPD Against Any Video Distributor

The Commission should use its authority over the video programming distribution market to protect online video distribution generally, by prohibiting MVPDs from behaving anticompetitively in ways that harm any video distributor, whether or not it is an MVPD. Section 628 of the Communications Act provides authority for this. This Section bans any actions "the purpose or effect of which is to

[46] 47 U.S.C. §§ 151, 152.
[47] *Comcast*, 600 F.3d at 646 *citing Southwestern Cable Co.*, 392 U.S. at 178.

hinder significantly or to prevent any multichannel video programming distributor from providing ... programming to subscribers or consumers."[48] The close connection between the markets for MVPD and non-MVPD video distribution mean that anticompetitive actions taken against an non-MVPD would likely have a deleterious effect on the ability of a competitive MVPD to offer programming—for example, by increasing its costs, or inhibiting the ability of an MVPD to offer programming on demand or online. The Commission and the courts have traditionally given Section 628 a "broad and sweeping"[49] reading that gives the Commission the authority to protect video competition as necessary. The Commission should follow this precedent and find that Section 628 prohibits anti-competitive actions by MVPDs against video distributors generally.

B. The Commission Should Consider the Policy Implications of the Increasing Popularity of On Demand Video

Finally, as more video moves online and as on-demand services have become an ever-greater part of even traditional MVPDs' offerings, it seems apparent that "channel"-oriented video consumption may, in the near future, no longer be the dominant way that viewers access some forms of programming. Some kinds of "must-see" programming may move solely to on-demand video and thus fall outside the Commission's competition rules. While the program access proceeding provides a vehicle to address some of these issues that docket is far more complex and deals with many other issues. Thus, in a further Notice of Inquiry in this docket, the Commission should begin to consider the ways in which its competitive framework

[48] 47 U.S.C. § 548.
[49] *Cablevision v. FCC*, 649 F.3d 695, 704 (D.C. Cir. 2011) (citing *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F. 3d 659, 664 (D.C. Cir. 2009)).

is challenged by the rise of on-demand video, and what steps it can take to ensure that the video market becomes more competitive.

CONCLUSION

For the reasons above, the Commission should find that online services that offer multiple channels of video programming fall within the statutory definition of "multichannel video programming distributor."

Respectfully submitted,

John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE

May 14, 2012

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
Interpretation of the terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding	)	MB Docket No. 12-83
	)	
	)	
	)	
	)	

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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June 13, 2012

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INTRODUCTION AND SUMMARY

The commenters in this proceeding have put forth a variety of legal and policy arguments both for and against the Commission recognizing that certain online providers can be multichannel video programming distributors (MVPDs). Certain misconceptions seem common among many commenters opposed to this pro-competitive action. These reply comments will briefly address these concerns as well as addressing related matters.

First, even supporter's of the Media Bureau's initial interpretation that provision of multiple, physical conduits to the home similar to 1984-style analog cable channels is the *sine qua non* of MVPD status concede that there is nothing in the plain language of the statute that compels such an interpretation.[1] Not only—as Public Knowledge, DirecTV, and AT&T observed in their initial comments—would such an interpretation would exclude many existing MVPDs, it would require the FCC to make constant arbitrary distinctions as to what does or doesn't constitute a "transmission path" and how much of the transmission path must an entity provide to win MVPD status. How would the FCC distinguish, for example, Sky Angel's physical facilities at the beginning of its transmission path where it receives the programming and the box it provides users to decode the programming from, for example, a DBS provider leasing a transponder on a satellite and using the "public airwaves" to transmit programming to a satellite receiver dish? Why is transmission

[1] Comments of Comcast in MB Docket No. 12-83 (May 14, 2012), at 8 (asking the Bureau to disregard the "untidiness" of the statutory language because "the intention was plain and universally understood"). Comcast's argument is somewhat undercut, however, by its insistence that this "plainly understood" meaning applied only to DBS, when the statute explicitly states otherwise. *Id.*

of programming to cable headends via satellite permissible, but transmission through the Internet "cloud" is not? Will Verizon Wireless become an MVPD if it offers subscribers an option to stream Time Warner Cable's video service, because it is now Verizon Wireless offering the "channel"?

It is far more sensible, and more in keeping with both the statutory language and the Legislative intent, to use the functional definition of MVPD urged by PK and others. The interpretation urged by the cable incumbents invites arbitrary distinctions that will only increase confusion and chill innovation and investment as the market increasingly embraces digital technologies.

Second, nothing in this proceeding would impact cable-specific regulation nor would Sky Angel or similar MVPDs acquire cable-specific obligations. Comcast's inexplicable but undoubtedly sincere concern that its would-be rivals will be crushed by the unbearable burdens that only a facilities based provider can endure is touching, but unwarranted.[2] Likewise, the somewhat more understandable concern from content providers with regard to preserving retransmission consent revenues, or from existing online tech companies that they will be transformed into MVPDs, is equally unwarranted.

On the other extreme, certain existing incumbents argue that a finding for Sky Angel will lower the barriers to competition and unleash competition "disruptive" to existing industry arrangements is somewhat more substantive. Accordingly, they argue for a definition that will suitably shackle new entrants and preserve the status quo. While PK wishes it could share the optimistic view of some commenters that

[2] Comcast Comments at 10-13.

the barriers to entry will drop so low that *anyone* could start a competing MVPD,[3] the cost of programming and other factors seem likely to keep out many would-be competitors.

Section 628 and the 1992 Act generally were intended to facilitate precisely the kind of "disruptive" competition these incumbents fear. It does not, as the incumbents suggest, provide free programming. It does not even provide the kind of price-control subsidy cable operators enjoy under the pole attachment rules. It simply gives those online distributors that want to provide MVPD services a level playing field on which to compete. The FCC should honor the Congressional intent to promote such "disruptive" competition by adopting a non-facilities based definition of "MVPD."

Finally, if the Bureau determines that "MVPD" and "channel" are ambiguous, it should refer the matter *en banc* to the Commission because the Bureau does not have the authority to decide novel questions of law.

I. There is No Requirement That an MVPD Must Provide a Complete Physical Transmission Path to a Viewer—Especially Since Such a Requirement Might Exclude Traditional MVPDs.

The law does not require that an MVPD must provide the entire "transmission path" that takes service to the customer, and arguing otherwise leads to absurd results. Syncbak is correct to observe that most ISPs do not provide a complete transmission path to a consumer's home: the last step of an Internet connection is typically provided over user-provided WiFi or ethernet.[4] Similarly, the last step of a cable "transmission path" may be home wiring provided by the subscriber or

[3] Comments of Cablevision in MB Docket No. 12-83, at 4 (May 14, 2012).
[4] Comments of Syncbak in MB Docket No. 12-83, at 8-9 (May 14, 2012).

building owner and not over wires provided by a cable operator. Homes and apartment buildings, for example, may be built with coaxial wiring preinstalled. Furthermore, cable systems have historically not provided "end to end" transmission of programming—leased satellite transmission capacity and other means are often part of the transmission path. And as MVPDs increasingly provide services to subscribers "over the top"—through video streaming apps, initiatives like TV Everywhere, and so forth—it becomes even more difficult to hold on to a requirement that MVPDs provide "transmission" as well as content.[5]

These issues illustrates the problems that arise from an overly physicalistic view of a "channel"—*e.g.*, suddenly a cable provider is not an MVPD—and argues against the Bureau creating a non-statutory requirement that MVPDs must provide a "transmission path," however conceived. Under this supposed "plain meaning" of the statute, the Commission will increasingly be required to make and justify arbitrary distinctions over what physical facilities an MVPD must provide. Is it sufficient that Sky Angel has physical facilities where it receives satellite distributed programming and transmits this to subscribers, who must have a physical box to decode the channels? It is hard to distinguish this from providers using wireless transmission, such as Wireless Cable providers and DBS providers, except that Sky Angle uses the Cloud and DBS provider use the public airwaves.

Such an interpretation would also raise questions where a wireless provider such as Verizon Wireless offers a video service. If what matters is the physicality,

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[5] Also, as PK argued in its initial comments, there is no reason to conclude that wireless services such as DBS provide a transmission path to consumers. Radio broadcasting does not involve any sort of physical "path."

not the nature of the programming, then Verizon Wireless' Viewdini service would appear to be an MVPD service because it aggregates multiple "video programming" which it provides through wireless channels. But Sky Angel, which actually pays to acquire programming and which maintains its own facilities, would not be an MVPD. This obviously absurd result—and resulting confusion—is best avoided by adopting a definition of MVPD that relies on what consumers commonly understand as a programming channel rather than on artificial distinctions not found in the statute.

Nevertheless, to the extent that the Bureau does decide to impose such a requirement, there is still no reason that online services cannot qualify as MVPDs. Syncbak is further correct that online services, as much as traditional cable systems, can be viewed as providing "transmission paths" to viewers' homes. In the case of online MVPDs, the transmission paths are composed of multiple physical and logical links. As PK argued in its comments,[6] there is no requirement that an MVPD provide a complete *physical* transmission path to a viewer—especially since such a requirement might exclude many traditional MVPDs. Thus the recognition that logical links would satisfy any transmission path requirement settles the issue that online services can qualify as MVPDs.

II. The Proper Reading of "MVPD" Does Not Affect Cable-Specific Regulation.

As Public Knowledge (PK) discussed in its comments,[7] the statute and Commission regulations use the word "channel" differently in different contexts. Thus, if the Bureau does hold that an online service can be an MVPD and finds that

[6] Comments of Public Knowledge in MB Docket No. 12-83, at 10 (May 14, 2012).
[7] Comments of Public Knowledge at 2-15 (May 14, 2012).

the word "channel" in the definition of MVPD does not refer to a specific physical transmission path, there would be no effect on any provisions that plainly do use the word channel to refer to a communications path and not to programming. In particular, when the statute speaks of "channel capacity," it is apparent that Congress intended the phrase to refer to capacity and not programming.[8]

Thus, what the Bureau does in this context will have no effect on rules about public, educational, or governmental (PEG) use of cable systems (nor on the question of who may qualify as a cable system as opposed to the broader category of MVPD). Nor will it impact franchise fees, pole attachment rates, or any other obligations or privileges uniquely assigned to the cable industry. The argument that adoption of a definition of MVPD that would somehow alter the regulatory status of existing cable systems, or that Sky Angel or other MVPDs using broadband to bring programming to the home of the viewer would find themselves subject to cable-specific regulations, is utterly unfounded.

III. Although A Decision For Sky Angel Will Lower Barriers To Entry and Spur Competition, The Cost of Programming and Other Obligations Associated With MVPD Status Will Still Limit Entry.

Cablevision is representative of commenters that urge the Commission to avoid the disruption that would stem from clarifying what services are MVPDs. It writes:

> De-coupling MVPD status from facilities ownership or control would effectively enable anyone to leverage the offering of a handful of amateur video clips into a right to demand access to high quality programming networks, a change of such far-reaching consequences for the video distribution and programming industries that it cannot be the correct interpretation of the term.[9]

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[8] *See* 47 U.S.C. § 531.

[9] Comments of Cablevision in MB Docket No. 12-83, at 4 (May 14, 2012).

Because the notice primarily raised issues of statutory interpretation, it is not initially clear what weight the Bureau should give such concerns. Here, Congress has created a broad category (multichannel video programming distributors) that unambiguously includes online providers that offer content via "channels," and the Bureau has no choice but to give effect to Congressional intent. Standard tools of statutory interpretation, including consulting the legislative history to the extent that it is necessary to clarify Congressional intent, suffice.

Thus, in some respects, Cablevision's concern is simply irrelevant. But when considering that Congressional intent to improve competition is clearly concordant with good policy, the issues Cablevision raises become relevant because the "harm" that Cablevision foresees is actually in the public interest. The "far-reaching consequences" it complains of are nothing more than the salutary effects of competition. Anyone *should* be able to start an MVPD. Nothing the Bureau does would somehow give online providers content for free or on terms that are somehow more favorable than those Cablevision itself enjoys—online MVPDs will have capital and content costs like any others.

The regulatory implications of clarifying who may be an MVPD may be profound. While none of the MVPD-related *statutes* raise any problems, the Commission will have to update many of its implementing rules to account for the full technological variety of different kinds of MVPDs.[10] But contrary to some commenters, the results

[10] One issue the Commission will have to grapple with relates to geography. An online MVPD, of course, has nationwide footprint like satellite, rather than a local footprint like cable. If such an MVPD carries a broadcast signal, should it only be allowed to make that signal available to its original market? Why should the Commission extend legacy requirements that stem from the physically local nature

of this clarification will not simply be a boon for online operators (and consumers), since there are regulatory obligations as well as benefits that attend MVPD status. As the Bureau summarized:

> The regulatory benefits of MVPD status include the right to seek relief under the program access rules and the retransmission consent rules. Among the regulatory obligations of MVPDs are statutory and regulatory requirements relating to program carriage, the competitive availability of navigation devices (including the integration ban), the requirement to negotiate in good faith with broadcasters for retransmission consent, Equal Employment Opportunity ("EEO") requirements, closed captioning and emergency information requirements, various technical requirements (such as signal leakage restrictions), and cable inside wiring requirements.[11]

Given this array of regulatory obligations, the choice to become an online MVPD is not an easy one. In addition to capital and funding the entity must be willing to operate in a regulated environment. But since entities like Sky Angel have shown they are willing to do this, the Commission's rules should not prevent them from providing a dose of healthy disruption to the video market.

IV. The Bureau Should Refer the Matter *En Banc* to the Commission if the Bureau Finds That "MVPD" and "Channel" are Ambiguous Because the Bureau Lacks Delegated Authority to Decide Novel Issues of Law.

PK does not concede that the definition of MVPD or channel is ambiguous because the evidence so strongly suggests a technology-neutral reading. Nevertheless the very existence of this proceeding shows that these definitions are, at least, controversial. If the Bureau does decide that the relevant terms are

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of broadcast and cable to the online world? *See* Comments of M3X Media in MB Docket No. 12-83, at 7-9 (May 14, 2012) (initiating this discussion).

[11] Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, Public Notice, DA 12-507, ¶2 (Mar. 30, 2012).

ambiguous, PK urges the Bureau to refer the matter *en banc* to the Commission, since the Bureau lacks the delegated authority to decide novel issues of law.[12]

Ambiguous terms in the Communications Acts represent implicit delegations of authority from Congress to the Commission to "fill in the gaps" with its policy expertise.[13] As PK discussed at length in its comments the sound policy in this case favors competition and not unnecessary technology-drawn barriers to entry. Thus if the Commission finds it necessary to clarify an ambiguous term where Congressional intent is not clear, it should do so in the only way that benefits the public by finding that online providers can be classified as MVPDs.

CONCLUSION

For the reasons above and in PK's initial comments, the Commission should find that online services that offer multiple channels of video programming fall within the statutory definition of "multichannel video programming distributor."

Respectfully submitted,

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June 13, 2012

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[12] *See* 47 CFR § 0.283(c) (matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines must be referred to the Commission en banc, rather than the Chief of the Media Bureau, for disposition).

[13] *See* Comments of Public Knowledge at 23, citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

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